



UNIVERSITY OF
TORONTO
FACULTY OF LAW

FREEDOM OF EXPRESSION AND THE PRESS IN CANADA

Cases and Materials

(Fifth Edition 2000)

VOLUME ONE

M. David Lepofsky

Jamie Cameron

Christopher Bredt

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1. INTRODUCTION

This chapter provides an overview of the basic principles of **Charter** interpretation which have been enunciated by the Supreme Court of Canada. It provides a backdrop for the balance of the book, which reviews the application of these principles to issues pertaining to freedom of expression. While many of these principles may seem familiar from a course on introductory constitutional law, they are in fact more complex than they first seem. For example, the test for justifying a **Charter** infringement under s. 1 is continually evolving. Although the original formulation of the s. 1 test in the Oakes case is still repeatedly cited in judgements, subsequent judicial pronouncements on its application make the original Oakes formulation less clear than it originally seemed to be.

2. BASIC APPROACH TO CHARTER INTERPRETATION – THE ROLE OF THE COURTS

Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.

ESTEY J.:-- ...

There are some simple but important considerations which guide a court in construing the **Charter**, and which are more sharply focused and discernible than in the case of the federal **Bill of Rights**. The **Charter** comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it "is the supreme law of Canada": s. 52, **Constitution Act, 1982**. It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The **Charter** is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the **B.N.A. Act, 1867** (now the **Constitution Act, 1867**). With the **Constitution Act, 1982** comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the court. [at 366-7].

1. INTRODUCTION

The question presented in this chapter is: to what extent did Canadians enjoy constitutional protection for freedom of expression prior to the enactment of the **Charter**? This question is of importance for more than simply historical reasons. To understand what **Charter** s. 2(b) means, it is necessary to examine what protection existed for speech and press freedom prior to its enactment. It is also important to consider what Canadian courts had to say about the idea of free speech, and to examine what importance they attached to this value before the **Charter**, as a backdrop to any evaluation of their treatment of this right under the **Charter**.

The view has been expressed on several occasions that Canadian courts have always treasured free speech, and acted as vigorously as their jurisdiction allowed before the **Charter** to protect expressive freedom. For example, Professor Peter Hogg has written in his book, Constitutional Law of Canada (2nd ed., 1985), at p. 713:

Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the **Charter of Rights**.

As well, in its **Charter** ruling in R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 573, McIntyre J. stated: "Prior to the adoption of the **Charter**, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status." This view has been repeated on a number of occasions in subsequent Supreme Court decisions, as will be seen throughout the materials in this book. To what extent are these descriptions accurate? What implications flow from this view for **Charter** analysis?

2. IMPLIED BILL OF RIGHTS JURISPRUDENCE

For several decades, it had been argued by some that the **British North America Act, 1867**, now the **Constitution Act, 1867**, included an "implied bill of rights" rooted in the Act's preamble, which declared Canada to have a constitution "similar in principle" to that of the United Kingdom. To what extent does the following case law support a claim that the Canadian Constitution guaranteed a constitutional right to freedom of expression prior to the **Charter**?

Being unknown to English law, the right to hold public meetings on the public domain of a city did not become part of the Canadian Constitution under the preamble of the **British North America Act, 1867**. ... [at 796-8].

A.-G. Can. v. Law Society of B.C.; Jabour v. Law Society of B.C., [1982] 2 S.C.R. 307.

The Law Society of B.C. did not allow its members to advertise their services. Jabour claimed that this prohibition violated his freedom of speech rights under the Canadian Bill of Rights.

He also claimed that the rules of the Law Society were null and void since they offended the Combines Investigation Act. The Supreme Court of Canada dismissed the appeals. It held that the freedom of speech was not constitutionally entrenched in Canada and is therefore not beyond the reach of the Legislature and can be curtailed by valid statute law.

Estey J.:-- ...

Freedom of speech has been valued as a fundamental right in this country, the United Kingdom and elsewhere for centuries. While the right to freedom of expression has on occasion been loosely described and sometimes insecurely planted in the law, reference can be found to it in such early formal documents as the **Bill of Rights** of 1689. Sometimes the right, as in that instance, was confined to freedom of debate in the Houses of Parliament; sometimes it is confined to freedom of the press; and sometimes the expression 'freedom of speech' or 'freedom of expression' is intended to connote the widest right of independence of expression free from unlawful suppression, interference, or punishment. Where the right is not entrenched beyond the reach of Parliament or Legislature, as has been done for example in the First Amendment to the United States Constitution, the right is subject to curtailment by valid statute law. ...

The freedom of expression with which the Court is here concerned of course has nothing to do with the elective process and the operations of our democratic institutions, the House of Commons and the provincial Legislature. We are indeed speaking about the right of economic free speech, the right to commercial advertising. It can hardly be contended that the province by proper legislation could not regulate the ethical, moral and financial aspects of a trade or profession within its boundaries. [at 362-4].

Notes and Questions

1. Taken together, what protection for freedom of expression are provided by the Alberta Press case, Saumur, Switzman, and Boucher? Is this protection constitutional in character?
2. Does it protect all expression or only certain kinds of expression?
3. Are there limits on freedom of expression which could be justified under this case law?

4. According to this case law, what are the purposes served by freedom of expression?
5. After Dupond, McNeil and Jabour, what is left of the implied bill of rights free speech doctrine?
6. In the absence of an express bill of rights, is it appropriate for courts to imply constitutional protection for freedom of expression? Were there other tools available for courts to protect this value, short of an implied constitutional right? Were these tools used extensively by courts?

3. THE CANADIAN BILL OF RIGHTS

In 1960, Parliament enacted the **Canadian Bill of Rights**, which provided in material part as follows:

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: ...

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ...

(d) freedom of speech; ...

(f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared... (the section goes on to enumerate the various legal rights protected by the Bill)

5. (1) Nothing in Part I [the substantive rights-bearing section of the Bill] shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

Initially, this statute held out great promise for the protection of civil liberties in Canada (see R. v. Drybones, [1970] S.C.R. 282). However, in a series of cases, the Supreme Court of Canada held that the Bill's guarantees were, in effect, to be narrowly applied, and generally would not be invoked to displace democratically-enacted legislation (see e.g. A.-G. Canada v. Lavelle, [1974] S.C.R. 1349; Curr v. the Queen, [1972] S.C.R. 889). Ironically, it was only after the **Charter's** enactment that there was some sign from the Supreme Court that the **Canadian Bill of Rights** might have some real potency (see Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177).

Within this framework, the free speech and press clauses of the **Canadian Bill of Rights** received only minimal judicial attention and application. See e.g. CKOY Ltd. v. The Queen (1978), 90 D.L.R. (3d) 1 ; SOLOSKY v. THE QUEEN (1979) 50 C.C.C. (2d) 495. R. v. Prairie Schooner News Ltd., (1970) C.C.C. (2d) 251.

Notes and Questions

1. In light of the enactment of the **Canadian Bill of Rights**, would it have been appropriate for the courts to give greater force to the implied bill of rights jurisprudence in the 1960s and 1970s?

2. With the enactment of the **Charter**, should the **Bill of Rights** be given short shrift, or should it be revitalized?

3. In Ford v. Quebec, [1988] 2 S.C.R. 712, the Supreme Court of Canada struck down Quebec's law requiring commercial signs to be in French only. It did so relying both on **Charter** s. 2(b) and the free speech provision of the Quebec **Charter of Human Rights and Freedoms**. That section provides as follows:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association. ...

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

The court did not make reference to the fact that this provincial charter was analogous to the **Canadian Bill of Rights**, nor did it attempt to rationalize the different force which the Supreme Court gave the **Canadian Bill of Rights**, as contrasted with the Quebec Charter.

4. The Supreme Court of Canada has generally held that **Canadian Bill of Rights** jurisprudence is not controlling when interpreting the **Charter**, and that a **Charter** provision may be given greater force than a comparably-worded section in the **Canadian Bill of Rights**. See e.g. R. v. Therens, [1985] 1 S.C.R. 613; Reference Re s. 94 of the B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

5. In contrast to the Supreme Court's narrow application of the **Canadian Bill of Rights**, based on concerns about parliamentary sovereignty, it has held that human rights codes are fundamental laws, which are not quite constitutional, but more significant than the ordinary statute. It has held that anti-discrimination statutes are paramount over other legislation, even if the human rights code does not include an explicit paramountcy or primacy clause. See Ontario Human Rights Commission v. Simpson-Sears, [1985] 2 S.C.R. 536 and the authorities cited therein. Is there a principled reason why courts should treat human rights legislation as paramount over conflicting laws, while being hesitant to give comparable treatment to the **Canadian Bill of Rights**?

1. INTRODUCTION

The question presented in this chapter is as follows: what purposes or functions are served by freedom of expression, including freedom of the press and other media of communication, as guaranteed by s. 2(b) of the Charter? This is the most fundamental, and perhaps the most vexing of the questions presented in these materials. Its resolution is central to the formulation of a coherent and principled approach to s. 2(b).

As a matter of abstract principle, we tend to assume that expressive activity is intrinsically valuable. From that perspective, it may not seem problematic to give expressive activity a special immunity from regulation. However, even in advance of any effort at tackling specific free speech topics, the very task of identifying the purposes for this freedom plunge us into fundamental questions, the answers to which are neither easy nor uncontroversial. Most of us would concede that expressed views can be offensive, odious or harmful. When confronted with that reality, we are forced to reconsider the assumption that expressive activity is per se valuable. Expressive freedom may be valuable in the abstract; does it necessarily follow, however, that it should automatically be protected by the Charter?

The Supreme Court of Canada has required a rigorous inquiry into the purposes served by freedom of expression. The court held in Hunter v. Southam, [1984] 2 S.C.R. 145 that the **Charter** is itself a purposive document, and that its rights are to be given a purposive interpretation. A purposive approach to a **Charter** right has twin components. First, the right must be interpreted in a sufficiently liberal fashion that it achieves its purposes. Second, the right should not be so inflated as to overshoot its purposes (R. v. Big M Drug Mart Ltd., at 344).

2. LEARNED COMMENTARIES ON THE PURPOSES FOR FREEDOM OF EXPRESSION

John Stuart Mill; On Liberty; (Middlesex: Penguin Books, 1985).

We have now recognized the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion, on four distinct grounds, which we will now briefly recapitulate:

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may, and very commonly does, contain

Notes and Questions

1. How does one discover a constitutional right's purposes? What sources may properly be considered? Are there any sources which should be omitted?
2. What assumptions are made about humankind and human nature in the following discussions about the purposes of free expression? Are these assumptions articulated?
3. Are American deliberations on the purposes for freedom of expression relevant in Canada? Is freedom of expression a transcendent, international norm, or does it admit of local diversity?
4. Are 19th century discussions of freedom of expression relevant in the late 20th Century?
5. How does one separate out the content of freedom of expression from the purposes of freedom of expression?

3. THE HOLMES CORRESPONDENCE

The following readings consist of correspondence exchanged between Oliver Wendell Holmes, Jr. (U.S. Supreme Court, 1901-1930), and Learned Hand (federal judge, S.D.N.Y. and renowned legal scholar), and Holmes and Harold Laski (a British legal scholar). These letters were written during World War I, when the first amendment jurisprudence began to evolve. They address the tension between the instinct that expressive activity is unique and the indisputable fact that speech can be just as harmful as conduct.

Given the evolution of first amendment doctrine and advent of s.2(b), the issue may seem academic at this point in time. Although Holmes's doubts may therefore seem dated, they raise important questions about the nature of expressive activity, and the special status it receives under both Constitutions.

The discussion in these letters is cryptic but provocative. Holmes did not concede the special status of expressive freedom under the first amendment until his dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919). There, he rationalized the freedom of speech guarantee through an analogy to "the marketplace of ideas".

In Masses Publishing Co. v. Patten, 244 Fed. 535 (S.D.N.Y. 1917), "The Masses", a "monthly revolutionary journal", sought an injunction to prevent the Postmaster General from excluding its publication from the mail pursuant to the federal **Espionage Act**. Learned Hand's decision upholding the first amendment claim was reversed on appeal.

His opinion in this case is the context in which his exchange with Holmes should be understood. Holmes, who was then a U.S. Supreme Court justice, seemed to resist Hand's suggestion that, short of direct incitement or advocacy of illegal action, expressive activity should be protected by the

defendants were deprived of their rights under the [Constitution].

Notes and Questions

1. What does Holmes mean in saying that "[p]ersecution for the expression of opinions seems to me perfectly logical"? As far as he is concerned, why is "opposition by speech" ever allowed? Given the proposition that legislative majorities are entitled to pursue the ideas they believe in, why then does he suggest that "the ultimate good is better reached by free trade in ideas"?
2. When Holmes refers to "the theory of our Constitution", what is he talking about? Is that theory any different than the theory represented by Herbert Spencer's "social statics"? Why or why not?
3. Thinking back to the Holmes-Hand-Laski correspondence, can you explain how Holmes arrived at the dissenting opinion in Abrams after expressing so much scepticism in those letters?
4. What assumptions does the marketplace theory rest on? Do any of them seem flawed? If the answer is yes, does that suggest that Holmes's theory is unsound? Should it be abandoned, refined, or otherwise taken at face value?
5. What are the constituent elements of a marketplace of ideas? To be effective, must the "marketplace" be perfectly competitive? Can this marketplace work if the means for communication to large audience are controlled by a small number of large corporations?
6. How far can this "marketplace" metaphor be stretched in the free speech context? Is it a helpful analogy, a convenient illustration, or a firm foundation for constructing legal doctrines?

Reference re. Alberta Statutes [the Alberta Press case], [1938] S.C.R. 100.

Duff, C.J.:--

[The legislation in question imposed affirmative duties on Alberta newspapers to publish the government's point of view in certain circumstances. After concluding that the press legislation was ultra vires, because it could not be severed from The Alberta Social Credit Act, which was also unconstitutional, Duff continued, as follows:]

... Under the constitution established by the [BNA Act], legislative power for Canada is vested in one Parliament. ... [It] can be said that [the BNA Act's] provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to

matters and have been expressly dealt with by the criminal code. No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada. Moreover, citizens outside the province of Alberta have a vital interest in having full information and comment, favourable and unfavourable, regarding the policy of the Alberta government and concerning events in that province which would, in the ordinary course, be the subject of Alberta newspapers' news items and articles.

Notes and Questions

1. For many years, Holmes's marketplace of ideas was accepted as dogma. After the court crisis, the status of the first amendment was further entrenched by Justice Cardozo's statement that free speech is "the matrix, the indispensable condition, of nearly every other form of freedom" [Palko v. Connecticut, 302 U.S. 319 at 327 (1937)], and the Roosevelt Court's theory of "preferred freedoms".

Although the "marketplace" concept was introduced in a case involving seditious speech, it did not single political expression out for unique or exclusive constitutional protection. The connection between expressive freedom and democratic process would not be emphasized until Alexander Meiklejohn's 1948 treatise, Free Speech and its Relation to Self-Government. Subsequently, in an influential article, Robert Bork made the argument that the first amendment should only protect political expression. See "Neutral Principles and Some First Amendment Problems", 47 Ind. L.J. 1 (1971). That view has not won widespread support.

2. Can a stronger argument along those lines be made in Canada? See Re Klein and L.S.U.C. (1985), 50 O.R. (2d) 118 (H.C.) Would an interpretation of s.2(b) that emphasized the importance of expressive freedom in a parliamentary system be inconsistent with our constitutional tradition? Would it be inappropriate to restrict the scope of s.2(b) to political expression? Why or why not?

3. If you reject a restrictive interpretation of s.2(b), does it necessarily follow that all forms of speech must be considered equally valuable? If all expression is equal, how do you explain the special status of political expression in the pre-Charter jurisprudence? Alternatively, do you think the Charter should recognize a "hierarchy" of s.2(b) values? If your answer is yes, can you suggest how the courts might draw distinctions between political, commercial, artistic, and cultural expression etc.?

4. Define "political expression".

5. Assume that Charter s. 2(b) were held to only extend constitutional protection to political expression. Assume further that a legislature passed a law which provides as follows:

(1) No person shall engage in any expressive activity which is not political expression, protected by the Charter of Rights.

- (2) Anyone who contravenes section (1) is guilty of an offence, and is liable for a fine of \$1,000 or imprisonment for 6 months.
- (3) This provision only applies within the legislative jurisdiction of this legislature.

Would this provision be constitutional?

6. Does recognition of "individual self-fulfilment" as an underlying value of the first amendment or s.2(b) of the Charter preclude definitional restrictions on the scope of the right? Surely communicative activity is inherently "self-fulfilling". Are definitional restrictions on the scope of s.2(b) consistent with this rationale?
7. Are there any adverse consequences in rejecting this rationale? For example, what would the status of artistic expression be?
8. What function do the underlying values of expressive freedom serve under the Charter? Do they delineate the scope of s.2(b)? If not, what other role could they play?

R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

McIntyre J.:--

[Despite concluding that the Charter does not apply to private litigation, the Court went on to consider whether picketing is protected by s.2(b). In addressing that question, Justice McIntyre drew on a number of sources to explain the underlying values a guarantee of expressive freedom serves].

Freedom of Expression

... Freedom of expression is not...a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

The importance of freedom of expression has been recognized since early times: see John Milton, Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England (1664), and as well John Stuart Mill, "On Liberty" in On Liberty and Considerations on Representative Government (Oxford 1946), at p. 14:

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

tend to be formulated in a philosophical context which fuses the separate questions of whether a particular form or act of expression is within the ambit of the interests protected by the value of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference under the structure of the Canadian **Charter** and the Quebec **Charter**. These are two distinct questions and call for two distinct analytical processes. [at 764-6].

Notes and Questions

1. Is McIntyre's approach to s.2(b) in Dolphin comprehensive? Which of the traditional first amendment rationales are endorsed, emphasized or ignored?
2. Is picketing political expression, expression that serves the marketplace function, or expression that is directed at self-realization [i.e., achieving compensation commensurate with the value of an individual's work]? Is it necessary to choose between the three? Why or why not?
3. Does McIntyre consider some rationales more important than others? If not, should he have? If he does, does he indicate his reasons for doing so?
4. What purposes for free expression are recognized in Ford? Does Ford add anything to Dolphin in this context?
5. When taken together, do Dolphin and Ford fail to recognize any purposes which freedom of expression serves?
6. Is it sufficient for Ford to recite these purposes for freedom of expression, without providing any discourse on how and why it arrived at them?
7. In the **Charter's** earliest days, the Supreme Court can be seen here trying to enunciate broad principles which will effect jurisprudence for a long time in this area. Is it appropriate for the court to speak in such categorical terms, at a point in time when it is not yet confronted with the full spectrum of free expression issues which are to come? Why or why not?

R. v. Keegstra (cite) Supreme Court of Canada, Per McLachline, J., dissenting

A. A Philosophical View of Freedom of Expression and the Charter

Various philosophical justifications exist for freedom of expression. Some of these posit free expression as a means to other ends. Others see freedom of expression as an end in itself.

Salient among the justifications for free expression in the first category is the postulate that the freedom is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions. This is sometimes referred to as the political process

1. INTRODUCTION

The purpose of this chapter is to provide an introduction to the jurisprudence under the First Amendment to the U.S. Constitution as it relates to the free speech and press clauses.

The First Amendment provides as follows:

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Throughout these materials, First Amendment jurisprudence pertaining to specific free expression topics is set out. This introductory overview will assist in the reading of the chapters that follow, by introducing the basic doctrines which have evolved under the First Amendment, and the juristic vocabulary that is frequently employed.

2. INTRODUCTION TO THE U.S. CONSTITUTION

Law Society of Upper Canada; Public Law Teaching Materials -- Bar Admission Course, 1988-89, Chapter 19: "Litigating Charter Claims: Legal, Factual and Evidentiary Ammunition".

First, since the American system of government, like the Canadian, is a federal one, there are two regimes of law: federal law and state law. The U.S. Constitution, although often referred to as the "federal constitution," is the supreme law of the United States. It binds federal, state and local governments vis-a-vis all of their actions.

Originally, the U.S. Bill of Rights was designed to bind only federal government action. When it was enacted as the first ten amendments to the U.S. Constitution at the end of the 18th century, its framers deliberately set out to leave state governments free from review under the U.S. Bill of Rights. Up until the U.S. Civil War, one will find cases dealing only with challenges to federal legislation under the U.S. Bill of Rights.

After the U.S. Civil War in the middle of the 19th century, a series of new amendments to the U.S. Constitution were passed expanding the Bill of Rights. This included, among others, the

generate a "chilling effect" on protected speech or conduct, then the impact is likely to be small. On the other hand, if today's decision necessitates the drawing of artificial distinctions between protected speech and protected conduct, and if the "chill" on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect could be very grave indeed. In my view,...the preservation and enforcement of the First Amendment guarantees [is crucial].

Notes

1. In a case decided in the United States Supreme Court on June 11, 1993 in a unanimous ruling the Court upheld a Wisconsin law which provided for enhanced sentences for people convicted of hate crimes. Mitchell, a black man, was convicted of assaulting a white man after telling the victim that the assault due to the victim's race. Mitchell challenged the state law claiming it violated his First Amendment rights since the state used evidence of his attitudes toward the victim's race to enhance the sentence.

The U.S. Supreme Court rejected Mitchell's argument.

Chief Justice REHNQUIST delivered the opinion of the Court.

**WISCONSIN, Petitioner v. Todd MITCHELL. No. 92-515. Argued April 21, 1993.
Decided June 11, 1993.**

... Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad because of its "chilling effect" on free speech. Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute. We find no merit in this contention.

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty-enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such as negligent operation of a motor vehicle (Wis.Stat. s 941.01 (1989-1990)); for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated. We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth

INTRODUCTION

This chapter considers how the words of s.2(b), guaranteeing "freedom of expression", should be interpreted as a general matter. It provides the underpinning for the discussion that follows throughout these materials. It focuses on key themes which are recurrent in free speech jurisprudence. This chapter takes a first look at those basic issues which are revisited throughout the rest of these materials.

Four fundamental questions are inherent in any inquiry into the **Charter's** constitutional free expression guarantee:

1. What is "expression", and should we invoke a distinction between speech on the one hand, and conduct or action on the other hand, to exclude certain types of activity from s.2(b)?
2. Once a court is satisfied that a communication or activity falls within the definition of "expression", should it draw a further distinction between protected and unprotected expression, in order to exclude activities not considered worthy of the Charter's protection?
3. What is meant by the term "freedom" in s. 2(b)? Does any interference with "expression" ipso facto constitute an infringement or denial of the "freedom" of expression? For example, does freedom in relation to expression include the freedom from state compulsion to say something that you do not wish to say?
4. In the general scheme of the Charter, when is it necessary to resort to s. 1, and when are free expression disputes to be resolved within the four corners of s. 2(b)?

We will begin with the basic principles set out in R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Ford v. A.G. Quebec [1988] 2 S.C.R. 712; and Irwin Toy Ltd. v. A.-G. Quebec, [1989] 1 S.C.R. 927. We will also take a preliminary look at the early Supreme Court of Canada pronouncements on compelled expression. We will then look to some important U.S. First Amendment cases dealing with comparable issues.

From the evidence, it may well be said that the concern of the respondent is pressing and substantial.

It will suffer economically in the absence of an injunction to restrain picketing. ... It may be argued that the concern of the respondent regarding economic loss would not be sufficient to constitute a reasonable limitation on the right of freedom of expression, but there is another basis upon which the respondent's position may be supported. This case involves secondary picketing - picketing of a third party not concerned in the dispute which underlies the picketing. The basis of our system of collective bargaining is the proposition that the parties themselves should, wherever possible, work out their own agreement. ...

When the parties do exercise the right to disagree, picketing and other forms of industrial conflict are likely to follow. The social cost is great, man-hours and wages are lost, production and services will be disrupted, and general tensions within the community may be heightened. Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective bargaining process. It is therefore necessary in the general social interest that picketing be regulated and sometimes limited. It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a...weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others. ...

I would say that the requirement of proportionality is also met, particularly when it is recalled that this is an interim injunction effective only until trial when the issues may be more fully canvassed on fuller evidence. It is my opinion then that a limitation on secondary picketing against a third party, that is, a non-ally, would be a reasonable limit in the facts of this case. I would therefore conclude that the injunction is "a reasonable limit [under s.1]."

Notes and Questions

1. Although Irwin Toy defines the scope of freedom of expression under s.2(b), the Supreme Court of Canada's discussion of picketing in this case remains important. Read what Justice McIntyre says about the scope of s.2(b) very carefully. Is it clear to you why the Charter would not extend to "threats of violence or acts of violence...the destruction of property, or assaults, or other clearly unlawful conduct"? Is it because the activities listed do not constitute "expression", or is it because such activities, despite being expressive, should not be protected by the Charter? Consider the following comment:

Despite recognizing picketing as constitutionally protected expression, McIntyre J. was not prepared to agree that s.2(b) protects all picketing. After noting that the purpose of labour picketing is economic, and implying that picketing can often be more "active" than "expressive", he stated that the Charter would not extend to picketing that is accompanied by threats or acts of violence, property destruction, assault, or "other clearly unlawful conduct". [Id. at 588].

Though any suggestion that the Charter might protect violent conduct may be intuitively unsound, it is also conceptually unclear why s.2(b) protects picketing in some cases but not in others. The text of s.2(b) draws no distinction between different types of expression, and McIntyre J. never stated explicitly that picketing loses its character as "expression" when it is violent, potentially violent, or otherwise "unlawful". Moreover, the fact that s.2(b) protects picketing does not mean that picketing can never be restricted. Reasonable limitations are explicitly permitted by s.1. ...

Thus it becomes difficult to understand, in the absence of any explanation for such distinctions, why the Charter protects some kinds of picketing but not others. For example, if picketing is covered because it is "political" expression, then the conclusion that unpeaceful picketing is not protected appears contradictory. However, if unpeaceful picketing is not protected because it is "economic" speech, then the initial decision to protect peaceful picketing is inconsistent with that conclusion. Moreover, if the "act" of picketing is expression, then one wonders why its status under s.2(b) should depend on whether or not it is peaceful. ...

J. Cameron, "The Forgotten Half of Dolphin Delivery: A Comment on the Relationship Between the Substantive Guarantees and Section 1 of the Charter", 22 U.B.C. Law Rev. 147, at 149-50 (1987).

Is it important for the Supreme Court of Canada to identify its reasons for excluding certain activity from s.2(b) more precisely? Why or why not?

2. In Reference re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, Justice McIntyre concluded that s.2(d) does not protect the right to strike. In doing so he quoted the following passage from Professor J.M. Weiler:

[If s. 2 is given an expansive definition], [s]ome judges might interpret section 1 so aggressively as to [remake] chunks of Canadian law. This might cause the legislators to retaliate by invoking the override. ... Alternatively, the courts might take the opposite tack by giving the legislators too broad an ambit under section 1. In either case, the courts, because of the Charter, will have to enter the legislative sphere. Where rights are specifically guaranteed,...this may on occasion be true. But where no specific right is found, the courts should refrain from intrusion. ...

Do you agree? Should these considerations influence a court in interpreting the **Charter**?

3. Justice McIntyre's definition of freedom of expression would exclude "other clearly unlawful conduct". Is it clearly unlawful to commit a tort? If the answer is yes, then why was the proposed picketing covered under s.2(b)? Would it have been preferable for the Court to have found that no breach occurred? Why or why not?

4. Can the content of the **Charter's** free expression guarantee be founded in any way on what is clearly unlawful conduct? What impact does such an approach have on s. 52(1) of the Constitution Act 1982, which provides that the Constitution, including the Charter, is supreme over all other laws?

(b) **The Supreme Court's Second Major Endeavour - Ford v. Quebec (A.-G.), [1988] 2 S.C.R. 712.**

The Court:-- ...

VII

Whether the Freedom of Expression Guaranteed in s. 2(b) of the **Canadian Charter of Rights and Freedoms** and by s. 3 of the Quebec **Charter of Human Rights and Freedoms** Includes the Freedom to Express Oneself in the Language of One's Choice

In so far as this issue is concerned, the words "freedom of expression" in s. 2(b) of the Canadian **Charter** and s. 3 of the Quebec **Charter** should be given the same meaning. As indicated above, both the Superior Court and the Court of Appeal held that freedom of expression includes the freedom to express oneself in the language of one's choice. After indicating the essential relationship between expression and language by reference to dictionary definitions of both, Boudreault J. in the Superior Court said that in the ordinary or general form of expression there cannot be expression without language. Bisson J.A. in the Court of Appeal said that he agreed with Boudreault J. on this issue and expressed his own view in the form of the following question: "Is there a purer form of freedom of expression than the spoken language and written language?" He supported his conclusion by quotation of the following statement of this Court in Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, at p. 744: "The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society."

The conclusion of the Superior Court and the Court of Appeal on this issue is correct. Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the **Charter of the French Language** itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality. That the concept of "expression" in s. 2(b) of the Canadian **Charter** and s. 3 of the Quebec **Charter** goes

that this Court in *Attorney General of Quebec v. Chaussure Brown's Inc. et al.* [1988] 2 S.C.R. 712, (referred to elsewhere as *Ford v. A.G. Quebec*) has held that commercial expression has the protection of s. 2(b). At pp. 766-67, it was said:

Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter. ...

It is evident then that ss. 248 and 249 of the Consumer Protection Act restrict forms of expression which fall within the protection of s. 2(b). Since I agree that the two sections in their prohibition of advertising aimed at children infringe the s. 2(b) right, the only question in issue is whether the sections can be justified as reasonable limits under s. 1 of the Charter.... (The discussions of s. 1 are omitted.)

Notes And Questions

1. What portions of the majority remarks on the content of s. 2(b) are ratio decidendi and what portions if any are obiter dicta?
2. Was it appropriate for the court to endeavour to formulate a test for s. 2(b)? Is it possible to formulate a comprehensive test?
3. If it is appropriate to formulate a s. 2(b) test, was *Irwin Toy* the right case for the court to do so? Was 1989 the right year? What are the advantages and disadvantages of enunciating a formula earlier versus later?
4. Turning to the substance of the *Irwin Toy* test, does this formulation make sense?
5. Are any portions of the *Irwin Toy* approach comparable to features in the First Amendment jurisprudence? If so, which features?
6. Do the examples given in the majority judgement fit the principles laid down there?
7. Setting aside *Irwin Toy*, try to draft a brief formulation of a s. 2(b) test. What problems do you encounter in doing so, if any?
8. *Irwin Toy* involved a corporation claiming to have the constitutional right to direct mass advertising at children under the age of 13. What role did this factual context play in the court's formulation of s. 2(b) principles? To what extent does the specific *Irwin Toy* claim fit within the jurisprudential approach that the court enunciates in this case?

9. Examine closely the majority's listing of the purposes for s. 2(b). Does this list include all the lofty aims which have been identified to date, either in prior Supreme Court cases, or in the learned writings which the court cites with approval?
10. Irwin Toy advances a definition of "expression" that may seem to be "literal", then adds a series of qualifications or exclusionary criteria. Does the Court offer any vision or theory of expressive freedom to explain this framework? Otherwise, how does the majority opinion rationalize the distinctions it draws between protected and unprotected activity?
11. Can you explain why certain activities are excluded from s.2(b) in Irwin Toy: is it because they are not "expressive" in nature, or is it because they are not protected by the **Charter**, despite their possible literal status as expression? Does it matter whether the Court excludes "violent forms of expression" as "conduct" rather than as "unprotected" types of expressive activity?
12. How would you rationalize the exclusion of activity which is undeniably expressive [in the literal sense] from s.2(b)? Analytically, what issue do those rationales address: the definition of expression itself [i.e., the preliminary issue of breach]; or the permissibility of limits on that freedom [i.e., the ultimate question of justification]? Do definitional restrictions on the scope of s.2(b) undermine s.1, and the justificatory function it was intended to serve? Is there a difference in constitutional principle between "defining" s. 2(b) at the s. 2(b) stage of the analysis on the one hand, and "limiting" s. 2(b) rights under s. 1 on the other?
13. How does the purpose-effect distinction from Big M affect the Court's definition of expression as any attempt to convey meaning? Should the state's purpose be considered relevant in determining the existence of a breach? Why or why not?
14. For a comment on this decision see, J. Cameron, "The Original Conception of Section 1 and its Demise: A Comment on Irwin Toy Ltd. v. A-G of Quebec", 35 McGill L.J. 253 (1989). In Irwin Toy, the court speaks of a law having a purpose to abridge freedom of expression. Whose "purpose" is determinative? That of the government proposing a statute? That of the cabinet minister, introducing the bill? That of all of the legislators voting on the bill? How is this "purpose" proven.
15. Why should a law or other government action be found to contravene s. 2(b) simply because its purpose was so intended, if it turns out in fact that the law or government action did not have any adverse effect on freedom of expression?
16. In Ford, the court found that one's choice of language is intimately bound up with the content of speech. Does this extend to one's choice of words, within a language? Does freedom of expression include a prima facie constitutional right to use profanities?

17. To what extent does s. 2(b) extend rights to listeners, as distinct from speakers? Do Irwin or Ford provide a useful consideration of this question?

18. In R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, the Supreme Court of Canada considered whether an Ontario statute, requiring retail stores to close on Sunday, infringed the freedom of religion of Saturday Sabbatarians. In addressing **Charter** s. 2(a)'s freedom of religion clause, Chief Justice Dickson defined "freedom" as the absence of coercion or constraint. Is this applicable to s. 2(b)? What does it mean?

19. After defining "expression" as the attempt to convey meaning, the Supreme Court of Canada added a series of qualifications. The first, which would exclude "violent forms of expression", is based on a distinction between the form and content of an expressive activity. What is a violent form of expression? How do we distinguish between the content of expression and the form of expression? Would some of the statements made by Saddam Hussein, or of those participating in any of the native blockades be considered a violent form of expression?

Can words themselves be inherently violent? Is "violence" an abstract concept? Should every expressive activity that either indirectly or impliedly endorses any form of violence, present or future, be excluded from s.2(b) of the **Charter**? As a matter of factual distinction, how would you define what is violent? For example, is a jacket which says "Fuck the draft" a violent form of expression?

20. U.S. supreme Court Justice Holmes once said, "[e]very idea is an incitement." [Gitlow v. New York, 268 U.S. 652). In terms of the scope of s.2(b), what does that observation suggest?

If the Court only intended to exclude expressive activities which are indistinguishable from violent acts themselves [i.e., an act of theft or rape], such acts would probably fall outside its initial definition of expression in any event. If pure acts are outside s.2(b), whether violent or not, was there any need to add a qualification for "violent forms"?

21. Though it is unclear, the Irwin Toy Court appeared to contemplate that some activities which are expressive may nonetheless be so violent as to forfeit the protection of s.2(b). Does the Court provide a rationale for excluding violent expressive activities from s.2(b)? Is its conclusion self-evident? Or is the violence which accompanies an expressive activity a factor that would justify a limitation under s.1, rather than a finding that no breach of s.2(b) had occurred?

22. In addition, the Court stated that a breach of s.2(b) would not occur in cases where a regulation was directed at the "physical consequences", rather than at the expression itself. What does this qualification mean? Are restrictions on tobacco advertising directed at the physical consequences of the expression, or at the expression itself? By banning newspaper vending boxes from its streets, was the City of Victoria simply attempting to avoid an undesirable physical consequence [i.e., clutter]? Do these examples fall within the Court's qualification for physical consequences? If they do you have any difficulty with a conclusion that these

prohibitions do not constitute a violation of s.2(b)? Otherwise, is the Court's exception for "physical consequences" more limited in its scope, to the subsequent consequences of expressive activity [i.e., the act of buying tobacco in response to an ad], as distinct and separate from the expressive activity itself? Once again, however, if this exception should be restricted to subsequent pure conduct, then there was no need to add the qualification (because such conduct would not constitute an attempt to convey meaning).

23. Is street begging an activity protected by Charter s. 2(b)? Assume that a municipality banned begging in public streets or on subway platforms, to eliminate the alleged harassment or nuisance posed by beggars to passers-by. Would this law contravene s. 2(b)? If so, could it be saved by charter s. 1?

24. Peace demonstrators erect a peace camp on Parliament Hill in Ottawa. Eventually, government officials demand that the camp be dismantled. Has the freedom of expression of the campers been infringed? What must they prove to get their foot in the s. 2(b) door? If there is a s. 2(b) breach, can it be saved under Charter s. 1?

In the pre-*Irwin Toy* case of *Weisfeld v. Canada*, (1989), 42 C.R.R. 238 (F.C.T.D.), the Federal Court dismissed this Charter claim. The plaintiffs, in their attempt to protest the Federal government's policy of allowing cruise missile testing in Canada, established a peace camp on the grounds of Parliament Hill. On April 18, 1983, government of Canada officials granted plaintiffs permission to erect a tent. Although RCMP officers removed the tent the next day, the plaintiffs continued their encampment without permission to erect a tent. In the fall of 1984, the shelter was reconstructed to be a more permanent edifice. The shelter was a symbol of protest. The actual protest was by word of mouth and through the handing out of leaflets.

Between September 1984 and April 1985, the Federal government offered to move the shelter to a nearby location once again, but the plaintiffs refused the offer. Many complaints were received by the Minister of Public Works that the encampment was an "eyesore". On April 22, 1985, the Minister of Public works ordered that the encampment be dismantled pursuant to s.4(2) of the *Trespass to Property Act*. On April 23, 1985, the Minister of Public Works enacted new regulations, which prohibited the erection of any structures or the placing of any objects on Parliament Hill. Further attempts to establish a peace camp were thwarted by the RCMP, pursuant to these new regulations.

McNair, J., held in part as follows:

... The plaintiff's thesis is simply that the establishment of a peace camp on Parliament Hill to symbolize his continuous and ongoing protest against the cruise missile policy was essential to the effective communication of his political message. ... the plaintiff's case is that he was expressing a political message of protest to the cruise missile policy of the Canadian government by both direct and symbolic means, and that the symbols represented by the shelters, tents and tables on Parliament Hill were in fact political forums for discussion and debate that were essential to the effective communication of the political message.... Plaintiff's counsel [argues that] ... Regulations strikes at the very core of the plaintiff's freedom of political speech as

manifested by the expressive symbols of shelters, tents and tables. In his submission, the statutory enactment in question goes beyond the mere regulation of time, place and things and inhibits the right of political expression. ...

... The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

... I find on the evidence that the plaintiff and his associates were never prevented from communicating their political message of protest to the government's cruise missile policy on the grounds of Parliament Hill by word of mouth solicitation or by carrying placards or banners or by handing out literature, nor were they ever prevented from assembling or associating on the Parliament Hill grounds for the purpose of making their protest views known by these means. What they were prevented from doing was erecting or placing shelters, tents, tables and other objects on the grounds of Parliament Hill. The evidence establishes that it was made abundantly clear to the plaintiff by the peace officers acting under the explicit instructions of the Minister of Public Works that he was free to communicate his message of protest to interested bystanders on Parliament Hill by oral or written solicitation or by demonstrating with placards and banners. While the shelters, tents, tables and other objects may have been intended as attractions for inviting further inquiry, the fact of their mere presence is not sufficient of itself, in my view, to make them essential, expressive symbols of the plaintiff's anti-cruise message. An uninformed newcomer to the neighbourhood of Parliament Hill, seeing the plaintiff standing by his table or seated by his tent, could not possibly know what the plaintiff was protesting without first asking and being informed. In short, the mere presence of the inanimate structures and objects per se could not be reasonably understood by the unenlightened viewer to be expressively communicative of the actual message sought to be portrayed thereby.

In my opinion, the freedom of expression guaranteed by s.2(b) of the Charter is not an absolute and unqualified freedom to disregard existing laws reflecting the collective interests of organized society as a whole. I find on the facts of the present case that the governmental constraints were directed only to the reasonable regulation of conduct in terms of time, place and manner restrictions. I am also of the opinion that these constraints did not impact adversely upon the content of the plaintiff's message as manifested by the normal vocal, visual or demonstrative means of communication in respect thereof. The plaintiff's case, as it seems to me, is that these governmental restrictions were aimed at inanimate objects or structures said to represent in themselves, on the basis of a purely subjective determination, the quintessential symbols of a message of protest. As indicated, I do not agree with that proposition. ...

25. What about expression which might lead to certain behaviour, which while not a crime in itself, leads to other activities which may be crimes, even if those crimes are relatively minor?

right to free expression. ...

It is so clear to me that the effects of the measures are not so deleterious as to outweigh the objective of the measures. The importance of the above-discussed objective cannot be overemphasized. There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the **Charter**. ...

In normal course, the suppression of one's right to express an opinion about a subject or person will be a serious infringement of s. 2(b) and only outweighed by very important objectives. In the foregoing analysis, I have sought to show that the negative order was minimally intrusive in a relative sense and also that the careful tailoring of both parts of the order has made this a much less serious infringement of s. 2(b) than, for instance, occurred in the National Bank case.

Notes and Questions

1. A theme which resurfaces from time to time in these materials is the extent to which compelled speech constitutes an abridgement of freedom of expression. Is there anything different in principle or in practice between the state's forcing you to say something that you do not believe, and the state's preventing you from saying something that you do believe, and the state forbidding you to say something that you do not believe?
2. Should the s. 1 test differ in cases of compelled speech and compelled silencing?
3. In some human rights cases, a respondent, who is found to have infringed the human rights of a complainant, can be ordered to apologize to the complainant. Does this violate **Charter** s. 2(b)? Is it saved by **Charter** s. 1?

Lavigne v. Ontario Public Service Employee Union et al. [1991] 2 S.C.R. 211

The Supreme Court here unanimously upheld the requirement that a public servant, whose workplace is governed by a certified union, must contribute dues to the union, even where a portion of those dues are used by the union for non-collective bargaining purposes. The appellant, Mr. Lavigne, had objected to union expenditures on certain political causes with which he disagreed. He alleged that this contravened his rights under Charter s. 2(d) and s. 2(b). While most of its discussion focuses on freedom of association, and on whether there was government action in issue in this case within the meaning of Charter s. 32(1), the case is significant vis a vis the meaning of s. 2(b) as well in the compelled expression context.

Facts

The following is the judgment of **CORY J.**:

On the question as to what constitutes "government" I ... agree with the reasons expressed by Justice La Forest ... In all other respects I am in agreement with the reasons of Justice Wilson.

The following is the judgment of **McLACHLIN J.**:

... I also agree with my colleagues that the payments at issue do not constitute expression under s. 2(b) of the Charter.

Notes and Questions

1. The court's lengthy discussion of the appellant's claim under Charter s. 2(d) freedom of association is omitted here. However, as a matter of general principle, what is the relationship between freedom of association under s. 2(d) and freedom of expression under s. 2(b)?

2. According to the approach to s. 2(b) taken in this case, would s. 2(b) entail a right to refrain from expression, had the facts demonstrated that the appellant's ability to refrain from expression had in fact been curtailed?

3. Does a right to refrain from expression flow from the Irwin Toy approach?

4. THE AMERICAN APPROACH TO THE PRIMA FACIE SCOPE OF FREEDOM OF EXPRESSION

(A) The Categorical Exclusion of Certain Messages from the First Amendment

In the U.S. context, definitional balancing, or the "two-tier" approach, as it is sometimes called, dates from the decision in Chaplinsky v. New Hampshire. the LITERAL TEXT OF THE First Amendment categorically and absolutely prohibits any abridgment of the freedom of speech. In the absence of a provision like s.1, the U.S. courts had difficulty rationalizing any limitations on rights. Chaplinsky represents one interpretive approach. Two-tier theory is based on an assumption that some generic types of expressive activity can be categorically excluded from the First Amendment as a matter of definition. After being followed in two important decisions, Beauharnais v. Illinois, 343 U.S. 250 (1952) (excluding group libel from the first amendment); and Roth v. United States, 354 U.S. 476 (1957) (excluding obscenity from the first amendment), two-tier theory gradually eroded and has now been superseded by the principle of content neutrality. [But see New York v. Ferber, 458 U.S. 747 (1982)]

heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. ... The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker. ..."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. ...

[T]he challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Notes and Questions

1. Chaplinsky also introduced the "fighting words" doctrine; the proposition that the First Amendment does not protect words which constitute a direct personal insult and thereby create a risk of violent confrontation remains good law.
2. Examine Chaplinsky's list of excluded categories. What is the connection, if any, between the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"? What does it mean to say that by their very utterance these words "inflict injury"?
3. For purposes of adjudication, what does it mean to say that a category of expression is definitional excluded? In Roth, Justice Harlan recognized how difficult it would be to maintain a distinction between speech that is categorically excluded and speech that is included, but outside the scope of protection in the particular circumstances. There, he stated that abstract classifications cannot determine concrete results because "every communication has an individuality and 'value' of its own." [354 U.S. at 497] Any assumption that obscenity is a "peculiar genus" that is "distinct, recognizable, and classifiable" was unrealistic. [Id.] Because the problems of decision-making do not "lend themselves to generalized definitions", he concluded that particularized judgments would be unavoidable. [Id.] Do those comments have any implications for the **Charter** and in particular, for the relationship between s. 2(b) breach and s. 1 justification?
4. Consider the underlying assumption of Chaplinsky: that some categories of expression are of such marginal social utility that the state's interest in prohibiting them outweighs the Constitution's interest in protecting them, as a matter of definition? Do you have any difficulty with this rationale? What is "social utility" and who decides what its content is? Is this a workable constitutional standard? why not?

5. Which approach do you prefer: Irwin Toy's articulation of abstract criteria to limit the scope of expressive freedom, or Chaplinsky's concrete list of excluded subjects?

6. Is it possible to develop an approach to s. 2(b) which does not require the court to engage in some kind of definitional exercise, or is this inevitable in light of the **Charter's** enunciation of rights, and its limitation of them under s. 1? Is there something different either in principle or in practice between defining a right of freedom of expression on the one hand, and identifying the scope of permissible limits on this freedom under s. 1?

(B) THE AMERICAN DISTINCTION BETWEEN SPEECH AND CONDUCT

In the American jurisprudence, THERE IS AN effort at distinguishing between pure speech, which is constitutionally protected, and pure conduct, which is not. In the middle lies the twilight zone of "symbolic speech" or "expressive conduct" - conduct which has expressive content. U.S. courts have struggled with the question of how to deal with this middle zone. The U.S. speech/conduct distinction rests, in part, on a textual justification. The First Amendment explicitly prohibits any abridgment of "the freedom of speech".

By guaranteeing "freedom of expression", s.2(b) of the **Charter** may be more flexible than the first amendment. Still, the **Charter** refers to expression, not conduct. Unless conduct is equated with expression, the Supreme Court of Canada may also choose to draw a line somewhere between protected expression and unprotected conduct.

In reading the following materials, consider these questions: Should a distinction be drawn between speech or expression on the one hand, and conduct on the other? As a question of fact, how should this distinction be drawn? Then, assuming that the distinction can be drawn, what relevance should it have? Specifically, how does it fit the **Charter's** scheme of breach and justification? Should some activity be absolutely be excluded from s.2(b) of the **Charter**? Or should the respective degrees of expression and conduct in any given activity only be taken into account in determining the scope of protection under s. 2(b) or the permissibility of limitations under s.1?

It might be argued that all speech is "conduct". Is it preferable to draw distinctions between speech on the one hand, and action on the other? Is this a way out of a problem, or just another way of getting into a problem? If one invokes a speech/conduct distinction, are we encouraging courts to submerge their constitutional adjudication in potentially complex line-drawing exercises?

conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted. The case [is] therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. ...

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation [unconstitutional].

Notes and Questions

1. Early in the evolution of the First Amendment jurisprudence, the U.S. Supreme Court protected a red flag display in Stromberg v. California, 283 U.S. 359 (1931), and freedom from compulsory flag salute, in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Despite those precedents, the Court continued to vacillate in cases that raised the speech-conduct distinction. In Cox v. Louisiana, 379 U.S. 559 (1965), for example, Justice Black argued in his dissenting opinion, that the First Amendment does not grant a constitutional right "to engage in the conduct of picketing or patrolling. ... Picketing, though it may be utilized to communicate ideas is not speech and therefore is not of itself protected by the First Amendment." [emphasis added]. Subsequently, however, a majority held that the symbolic act of wearing black armbands in school to protest the Vietnam War was "closely akin to pure speech". Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

In addressing this issue, the Court faced the following dilemma: as Justice Black observed, to treat conduct as speech would obliterate a distinction the First Amendment makes mandatory. Such a conclusion would not only deny the state considerable authority to regulate conduct, but also jeopardize or demean the first amendment's status as a "preferred freedom". On the other hand, the Court was aware that conduct communicates ideas and messages in many cases, and that communicative activity often combines elements of conduct and expression. In such circumstances, a categorical distinction between speech and conduct seems artificial.

2. It is arguable that, in publicly burning his draft card, O'Brien did not engage in any speech activity, at least as "speech" is traditionally defined. Did the Court deny the existence of any expressive element in O'Brien's conduct?

Would the result have been any different if he had stood on the steps of the courthouse, loudly

verbalizing the message his card-burning display depicted? Should it have been? See Street v. New York, 394 U.S. 576 (1969) (reversing a conviction for flag-burning: because the accused simultaneously denounced the flag verbally while engaging in the act of burning it, it was impossible to determine whether he had been punished for the act of flag-burning or for the words he uttered).

Is it appropriate for the Court to distinguish between "pure speech" [as in Tinker], and "speech plus" [as in Cox II, and O'Brien]? Why or why not?

3. In what way did the Court consider the speech/conduct distinction relevant? How deferential to government was the standard of review in this case? Should the Court have been stricter or more relaxed in its assessment of the state's justification for punishing O'Brien? Why or why not? In particular, do you think O'Brien was convicted because the message he delivered was politically unacceptable, or because burning a draft card is less expressive and therefore entitled to less protection under the first amendment?

4. It was common ground that the purpose of this regulation was to prevent the destruction of draft cards as a form of opposition to the Vietnam war. Should a censorial motive on the part of the state have been taken into account in this case? Why or why not?

5. Do you agree that the prohibition against tampering with his draft card only imposed an incidental limitation on O'Brien's First Amendment rights? Should the First Amendment protect his freedom to protest the war in this particular way? Does the fact that he remained free to protest the war in other ways justify this particular regulation?

Texas v. Johnson, 109 S.Ct. 2533 (1989).

[After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. See infra, Chapter VI, for the Court's discussion of the facts, and applicable First Amendment doctrine. This excerpt deals with the status of flag burning and the speech/conduct distinction.]

Brennan J.: ...

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. ... This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, e.g., Spence v. Washington, 418 U.S. 405, 409-411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e.g., United States v. O'Brien, 391 U.S. 367, 377 (1968); Spence, supra, at 414, n. 8. If the

triggered by the Cambodian incursion and the Kent State tragedy." 418 U.S., at 410. The State of Washington had conceded, in fact, that Spence's conduct was a form of communication, and we stated that "the State's concession is inevitable on this record." *Id.*, at 409. ...

Johnson burned an American flag as part - indeed, as the culmination - of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. ... In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," *Spence*, 418 U.S., at 409 to implicate the First Amendment.

Notes and Questions

1. There was no expressive activity, concurrent with the prohibited conduct, in either *O'Brien* or *Johnson*. In *Johnson*, however, the U.S. Supreme Court seemed to assume that every act of flag desecration will *per se* be understood as a form of political protest. In *O'Brien*, was the Court willing to make the same assumption about other symbolic acts of protest involving physical destruction?

Is there any relevant difference between burning a flag and burning a draft card: both seem more akin to conduct than speech. Yet the Court declined to apply *O'Brien* in *Johnson*. Can there be any doubt that *O'Brien*'s card burning was intended to be and was understood as an expression of his opposition to the war? Does that suggest that *Johnson* implicitly overrules *O'Brien*? Alternatively, should *Johnson* be understood as a decision that deals only with the flag as a unique national symbol?

2. What about a statute that prohibits anyone from wearing a "mask, hood, or device" to conceal identity? When members of the Ku Klux Klan wear their white hoods, are they communicating any message? Should their right to wear those masks be protected under the First Amendment as symbolic conduct? Why or why not? [See *Georgia v. Miller*, No.90D929-2] (invalidating a statute that prohibits members of the Klan from wearing their traditional white hoods to conceal their identity).

3. How would the Canadian authorities, *Dolphin Delivery* and *Irwin Toy*, analyze an act of flag desecration?

4. Consider the following passage from Chief Justice Rehnquist's dissenting opinion in *Johnson*:

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of 'symbolic speech'. Far from a case of "one picture

being worth a thousand words", flag burning is the equivalent of an inarticulate grunt or roar that...is most likely to be indulged in not to express any particular idea, but to antagonize others. ... The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest -- a form of protest that was profoundly offensive to others -- and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his disapproval of national policy. ... It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it...for which he was punished. If, as Justice Rehnquist suggests, Johnson was otherwise free to engage in political protest through verbal means, why should he be entitled to claim constitutional protection for his conduct? Is Rehnquist's a valid point? Why or why not?

5. Under U.S. doctrine, would it be constitutional to pass a law, within a legislature's legislative jurisdiction, which provides that "No person shall engage in speech which is not protected by the First Amendment."?

6. Is it necessary for every act of expressive activity to advance "a particularized message", in order to warrant the Constitution's protection? What is so "particularized" about an act of flag desecration? a black armband protest? In any event, what is a particularized message: the particular message the speaker attempts to convey, or whatever particular interpretation the listener gives that message? Is the listener's reaction relevant at all?

7. Clark v. Community for Creative Non-Violence, 468 U.S. (1984) considered whether a National Park Service regulation prohibiting camping in certain parks violated the First Amendment. Demonstrators proposed to "sleep" in Lafayette Park and the Mall in Washington D.C. in order to protest and call attention to the plight of the homeless. Two aspects of the U.S. Supreme court's decision are significant. First, the court agreed that overnight sleeping in a national park is expressive conduct for purposes of the First Amendment. Second, however, a majority concluded that the camping prohibition served a valuable purpose of protecting parks. By contrast, the dissenting opinion argued that the sleep-in was the speakers' most effective way of communicating their message and therefore, that the state could not justify its prohibition against camping in the circumstances of this case. Does Charter s. 2(b) guarantee the use of the most effective mode of getting one's message across, or just the right to get it across somehow or other?

but also for guidance, professional judgment, and vital emotional support. Accordingly, each of us attaches profound importance and authority to the words of advice spoken by the physician.

It is for this reason that we have guarded so jealously the doctor/patient dialogue from governmental intrusion. ... The majority's approval of the Secretary's Regulations flies in the face of our repeated warnings that regulations tending to "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession," cannot endure...

JUSTICE STEVENS, dissenting.

... Because I am convinced that the 1970 Act did not authorize the Secretary to censor the speech of grant recipients or their employees, I would hold the challenged regulations invalid...

Even if I thought the statute were ambiguous, however, I would reach the same result for the reasons stated in JUSTICE O'CONNOR's dissenting opinion. As she also explains, if a majority of the Court had reached this result, it would be improper to comment on the constitutional issues that the parties have debated. Because the majority has reached out to decide the constitutional questions, however, I am persuaded that JUSTICE BLACKMUN is correct in concluding that the majority's arguments merit a response. I am also persuaded that JUSTICE BLACKMUN has correctly analyzed these issues. ...

JUSTICE O'CONNOR, dissenting, would have struck the regulations down on administrative law grounds, and hence, found it unnecessary and inappropriate to pronounce on the constitutional attack.

Notes and Questions

1. How would this case be decided under Irwin Toy? Do the regulations restrict "expression"? If so, is their purpose to restrict freedom of expression? Is that their effect?
2. Is the court correct in concluding that there is no First Amendment violation here? Compare this case to Lavigne supra. Is this a compelled speech case? Is the alleged burden on expression greater here than in Lavigne, or is it less?
3. Do you find persuasive the majority's view that as for clinic employees, it is a matter of their own personal choice that they opt to work at a regulated clinic, and so they have no basis for blaming the government about restrictions on their speech at work? Compare the discussion later in these materials about the constitutionality of laws restricting political activity by public servants in Chapter 24.

in respect of a referendum", the Chief Electoral Officer could have used s. 9(1) of the Canada Elections Act to permit the appellant Haig to vote as Decary J.A. outlined. Hopefully, the Canada Elections Act or the Referendum Act provisions will be clarified if Parliament decides to hold a referendum in the future. ...

The following is the judgment delivered by

[para157] LAMER C.J. (dissenting):-- I agree with Cory J. with respect to the proper approach to the definition of residency for voting purposes. I also agree with Iacobucci J. concerning s. 2(b) of the Canadian Charter of Rights and Freedoms and with respect to his proposed disposition of this appeal. I would, therefore, dispose of the appeal as proposed by Iacobucci J.

Notes and Questions

1. Do you agree that casting a secret ballot in a referendum is "expression"? What are the arguments for and against this proposition, beyond the discussion of this in these opinions?
2. What are the implications of a holding that the exercise of the vote is an exercise of expression? Is the chance to answer a public opinion poll, contracted for by the federal government to test the political waters, equally "expression"?
3. What if anything was Haig trying to say? Was he able to say it? Has this case expanded the concept of "expression" beyond its characterization in *Irwin Toy*?
4. Do you think that Haig's inability to vote in a referendum that day violated his s. 2(b) rights? If so, should s. 1 save this? If not, what more would you need to establish a s. 1 defence here?
5. Elsewhere, the Supreme Court has dealt with the proper approach to the overlap between freedom of religion in s. 2(a) and freedom of expression in s. 2(b) to harmonize the two rights. (See e.g. *Ross v. N.B. School District* and *Young v. Young*) Is that effort consistent with the Court's approach to s. 2(b) here as it interrelates with the right to the federal and provincial vote in s. 3 of the Charter?

Native Women's Assn. of Canada v. Canada [1994] 3 S.C.R. 627

During the constitutional reform discussions which eventually led to the Charlottetown Accord, a parallel process of consultation took place within the Aboriginal community of Canada. The federal government provided \$10 million to fund participation of four national Aboriginal

[para90] In the result, I would allow the appeal.

The following are the reasons delivered by

[para91] McLACHLIN J.:-- I would allow the appeal on the ground that the freedom of governments to choose and fund their advisors on matters of policy is not constrained by the Canadian Charter of Rights and Freedoms. In this respect I would adopt the statements of O'Connor J. in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), cited by Sopinka J. in his reasons for judgment. I would distinguish the policy consultations at issue in this case from a formal electoral vote of the type at issue in *Haig v. Canada*, [1993] 2 S.C.R. 995. I find it unnecessary to determine whether the evidence was capable of demonstrating a violation of the Native Women's Association of Canada's rights under s. 2(b) or s. 15 of the Charter.

[para92] I would dispose of the appeal as proposed by Sopinka J.

Notes and Questions

1. Does this case involve a governmental restriction on "expression", either as you would have it defined, or as Irwein Toy defines it?
2. If this case involves "expression" being regulated, what else does? What does not?
3. How does the analysis of this case square with the "public forum" approaches of the various justices in the *Committee for the Commonwealth of Canada* case? What are the common issues or elements?
4. How does this case fit in with the issue of a claim by a member of the public to a s. 2(b) right of access to airtime on the broadcast media?
5. Had the appellant won under s. 2(b), is the *Oakes* s. 1 test suitable for dealing with limits on this right?
6. To what extent should cost be a defence under Charter s. 1 to free expression claims? The Supreme Court rejected cost to government as a justification for denying an accused person their s. 11(b) right to a trial in a reasonable time, in *R. v. Askov*? (1990) 59 C.C.C. (3d) 449, holding "The right guaranteed by s. 11(b) is of such fundamental importance to the individual and of such significance to the community as a whole that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials."

Notes and Questions

1. Is the practice of accounting "expression" within the meaning of s. 2(b)? What about the practice of law?
2. Is this any less expression than the vote in the referendum considered in the Haig case?

1. INTRODUCTION

This chapter commences the inquiry into the status of expressive activity that may offend. As experience has shown, legislative majorities have at times been unable to resist the temptation to prohibit activity that is perceived to be politically, socially or morally offensive. Much of the First Amendment jurisprudence finds its roots in the sedition and espionage cases of the First World War era, and the debate about the permissibility of suppressing communist activities during the Cold War.

Offensive unpatriotic speech may offend its citizens, but is aimed primarily at the state. The suppression of opinions that criticize the government seems particularly inappropriate in a democracy. To Canadians, therefore, the American cases discussing the censorship of unpatriotic expression - as in the Vietnam protest and flag desecration cases - may seem distinctively American.

A subsequent chapter considers the validity of legal restrictions on defamation law. In considering subversive and unpatriotic expression here, it may seem equally clear to some that defamatory statements should not receive any constitutional protection, because in the case of defamation, the offensive expressive activity in question is directed at an individual or individuals, or at members of an identifiable group.

As a matter of principle, however, it may be less clear why individuals should be free to express unorthodox, disloyal or offensive opinions about the state, but not about each other. Whenever the state acts to protect the listener, through Criminal Code provisions or the common law of defamation, it necessarily suppresses the views of the speaker. Whether the censorship of offensive expression is consistent with a guarantee of expressive freedom is the subject of these materials.

These materials lead naturally into subsequent chapters which consider the status of racist speech, and obscenity, pornography and sexist speech, respectively. In discussing whether the state can prohibit opinions, beliefs or ideas it disapproves of, our focus will be on the viability of "content neutrality" as a general principle of adjudication.

2. NOTE: FREEDOM OF EXPRESSION AND THE OFFICIAL REGULATION OF THE CONTENT OF EXPRESSION

The Canadian jurisprudence relating to subversive and unpatriotic expression derives primarily from a series of cases that considered laws passed by the Duplessis government in Quebec during the 1940s and 1950s. These cases are discussed earlier in these materials, in the chapter on pre-Charter Canadian treatment of freedom of expression. Although the cases turned largely on division of powers issues, Justice Rand developed his theory of an "implied bill of rights" in cases

Notes and Questions

1. a) The view that an implied bill of rights existed within the preamble to the **Constitution Act, 1867**, was first suggested by Duff C.J. in The Alberta Press Case, *supra*, in the chapter on pre-Charter Canadian law on freedom of expression. This suggestion was adopted and developed by Rand, Kellock and Locke JJ., in Saumur v. City of Quebec, [1953] S.C.R. 299, and by Rand, Kellock and Abbott JJ., in Switzman v. Elbling [1957] S.C.R. 285. Justice Abbott reasons in Switzman indicated that he was prepared to extend the concept even further:

... although it is not necessary, of course, to determine this question [in this appeal], the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of the opinion that as our constitutional act now stands, Parliament itself could not abrogate this right of discussion and debate. (See also the excerpt from Switzman in the chapter on pre-Charter Canadian treatment of freedom of expression.)

2. In Boucher v. The King, [1951] S.C.R. 265 a Jehovah's Witness was convicted of publishing a seditious libel. He had distributed a pamphlet titled "Quebec's burning hate for God and Christ and Freedom is the shame of all Canada". The pamphlet was critical of the Quebec legislature and the Quebec courts. A majority of the Court agreed that a new trial should be ordered. Justice Rand's comments about expressive freedom are of interest:

... The crime of seditious libel is well known to the common law. ... If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive. ...

But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public. ...

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection ... or ill-will or hostility..., but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the staff of daily experience to suggest that mere ill will as the product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency. What is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order

on broader and deeper uniformities as bases of social stability. Similarly in discontent, disaffection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and...in the search for the constitution and truth of things generally.
...

3. How would Switzman and Boucher be decided under the **Charter**? According to Irwin Toy, would seditious libel be considered a violent form of expression, and therefore excluded from s.2(b); alternatively, should it be characterized as "advocacy" rather than as "incitement"?
4. Could the **Criminal Code's** seditious libel provision sustain a **Charter** challenge? does it conflict with **Charter** s. 2(b)? Is resort to s. 1 required? If resort to s. 1 is required, would this provision be defensible under the reasonable limits clause?

4. THE FIRST AMENDMENT AND SUBVERSIVE AND UNPATRIOTIC SPEECH

Cohen v. California, 403 U.S. 215 (1971).

Harlan J.:

Appellant...was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code [s.] 415 which prohibits "maliciously and wilfully disturb[ing] the peace or quiet of any neighborhood or person...by...offensive conduct..." ... He was given 30 days imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse...wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket [to inform] the public of the depth of his feelings against the Vietnam War and the draft.

The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. ... Cal.App.3d 94, 97-98 (1969).

[To decide this case, it is necessary to address the speech-conduct question.]

The conviction quite clearly rests upon the assertive offensiveness of the words Cohen used to convey his message to the public. The only conduct which the State sought to punish is the fact of communication. Thus, we deal here with the conviction resting solely upon speech, not upon

must be reversed.

Blackmun J. (dissenting): ...

Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. ... The California Court of Appeal appears so to have described it,...and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seem misplaced and unnecessary. ...

Notes and Questions

1. For the evolution of the First Amendment's general approach to subversive and unpatriotic expression, see the excerpts from Schenck v. U.S., 249 U.S. 47 (1919), Abrams v. U.S., 250 U.S. 616 (1919), Whitney v. California, 274 U.S. 357 (1927), and U.S. v. Dennis, 341 U.S. 494 (1951) in the earlier chapter on general First Amendment principles.

2. Here the state insisted that it was not the content of Cohen's message that was offensive, but its form. In other words the state was not seeking to censor Cohen's anti-war message, it was only seeking to protect the public from an offensive presentation of that message. Is this a principled distinction? On the other hand, however, if you agree with the Court in this case, does that mean the First Amendment prohibits the state from imposing any limitations on an individual's freedom to express himself offensively? If Cohen had shouted "fuck the draft" out, would the result have been the same? Urinated to express his disapproval? Shouted while urinating? Why or why not?

3. Subject to the speech-conduct distinction, and the question whether the state was merely restricting the presentation of the message and not its content, Cohen's jacket was constitutionally protected as political speech. Note that before reaching this conclusion, the Court considers a number of possibilities: that the jacket would cause violent outbreaks, either hostile or sympathetic, or was otherwise "obscene."

Acknowledging that there is a legitimate state interest in preventing speech that would result in breaches of the peace, is it legitimate for the state to enforce morality through its authority to prohibit opinions that are considered offensive? Should any legislative body, no matter what its composition, have the power to quell unpopular speech? If your answer is no, does that mean that the legislature has no power to prohibit any opinions on the basis of their content? When might such a power be consistent with the first amendment? Unless prospective violence is the sole criterion of unconstitutionality, is there any way to exclude offensive speech from the first amendment?

4. For Canada's own "Cohen v. California" equivalent, see R. v. Stewart (1980), 54 C.C.C. (2d) 503 (Ont. Prov. Ct.), in which a person, entering Canada at the U.S. border, was charged with exhibiting an obscene or disgusting object, because he wore a button reciting the words "Fuck Iran". In finding that this did not constitute a contravention of the criminal law, the court held in material part as follows:

In early times, which times are still within the recollection of this Court, the word which the Crown relies on as making the button in question disgusting, meant to have sexual intercourse. It is put, however, that such meaning is no longer the sole interpretation to be given the word and that in common parlance such meaning is not the meaning intended to be conveyed at all. Surely, with respect to the button in question, the author did not intend to convey the notion that everyone should engage in sexual intercourse with Iran. Such an interpretation would be ridiculous in the last degree. One must, I believe, conclude that the word used on the button, given the present political relationship and climate which exists relative to Iran, is meant as a denunciation of that country. In other words, it is a more than forceful way of saying, "down with Iran", or, if I may, "to hell with Iran".

It is put that the use of the word in question is quite prevalent in our society today, among certain people that is, and that, as already stated, the meaning to be attached to the word generally has changed. The gap between its original meaning and its present day meaning is the size of a gigantic chasm. [at 505].

Texas v. Johnson, 109 S.Ct. 2533 (1989).

Brennan J.:

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. ...

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." ... [T]he purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flag pole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the

perhaps convey with a motion picture projector - his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for - and our history demonstrates that they are - it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

Notes and Questions

1. The majority opinion might be seen as a good example of First Amendment romanticism; its rhetoric appeals to "the dissident tradition" that was protected in important decisions like Barnette (The Flag Salute Case). Do you find the majority opinion persuasive? This was not a case in which Johnson destroyed a piece of his own property: the flag he burned was stolen. How was his act different from any other act of destruction or property damage? Why should the First Amendment protect this act of destruction but not other types of property damage, such as writing graffiti on building walls and subway cars? [Presumably he could be convicted for defacing the property of others with graffiti.]

Recall that Justice McIntyre explicitly stated in Dolphin Delivery that "threats or acts of violence, property destruction, assault, or other clearly unlawful conduct" are excluded from s.2(b) of the **Charter**. Does that mean that an act of flag-burning or flag-trampling would not be within the scope of freedom of expression in Canada? Would either of these acts be excluded from s.2(b) under Irwin Toy, as a violent form of expression? Is a regulation prohibiting flag desecration merely aimed at the physical consequences? i.e., the destruction of property? Would Johnson's act of protest be excluded from s.2(b) under that branch of Irwin Toy's doctrine?

2. Moreover, as both Rehnquist C.J. and Stevens J. observe, Johnson otherwise remained free to engage in political protest through any number of alternative ways. In other words, he was only being punished for the form his expression took, and not its underlying message of protest.

Flag-burning is the ultimate act of heresy in American political culture. If the state cannot limit the manner in which the message was communicated in a case like this, can it ever deny the speaker the right to destroy property in the name of "protest"?

In the Weisfeld case, (1989), 42 C.R.R. 238, dealing with the Parliament peace camp, the Federal Court, Trial Division heard a s. 2(b) argument that the establishment of a peace camp on Parliament Hill to symbolize the plaintiff's continuous and ongoing protest against the cruise missile policy was essential to the effective communication of his political message and that the actions of the defendants in dismantling and removing the peace camp shelter from Parliament Hill violated ss.2(b), 2(c) and 2(d) of the **Charter**. The plaintiff claimed that he was expressing a political message of protest to the cruise missile policy of the Canadian government by both direct and symbolic means, and that the symbols represented by the shelters, tents and tables on Parliament Hill were in fact political forums for discussion and debate that were essential to the effective communication of the political message. The court held that the plaintiff and his associates were never prevented from communicating their political message of protest to the government's cruise missile policy on the grounds of Parliament Hill by word of mouth solicitation or by carrying placards or banners or by handing out literature, nor were they ever prevented from assembling or associating on the Parliament Hill grounds for the purpose of making their protest views known by these means. What they were prevented from doing was erecting or placing shelters, tents, tables and other objects on the grounds of Parliament Hill. It concluded that:

the freedom of expression guaranteed by s.2(b) of the Charter is not an absolute and unqualified freedom to disregard existing laws reflecting the collective interests of organized society as a whole. ...the governmental constraints were directed only to the reasonable regulation of conduct in terms of time, place and manner restrictions. ...these constraints did not impact adversely upon the content of the plaintiff's message as manifested by the normal vocal, visual or demonstrative means of communication in respect thereof.

Was there any evidence that the peace camp caused any physical damage to the grounds at Parliament Hill? The peace camp activists presumably believed that they had selected the perfect time and place and manner for making their position known to members of Parliament and the public. It is likely that judges who were unwilling to recognize the special symbolic status of the flag in Johnson would possibly be unlikely to recognize Parliament's authority to preserve the aesthetic appearance of the National Capital Region. Does Johnson suggest that Weisfeld was wrongly decided?

3. Under the first amendment, the state is allowed to regulate radio and television broadcasts which are considered offensive, at least in part, on the theory that the "airwaves" are a public trust which must be administered by the government on behalf of society at large. Is an analogy to the flag, as a national symbol that belongs to "we, the people" as a collective entity, far-fetched? Could the state protect the flag from defacement by declaring exclusive property rights in it and licensing its use?

4. This Term, the U.S. Supreme Court invalidated the federal **Flag Protection Act** of 1989. See United States v. Eichman, 110 S.Ct. 2404 (1990).

1. INTRODUCTION

This chapter inquires into the extent to which freedom of expression can justifiably be limited in order to protect national security. In examining the following materials, consider the two conflicting claims which inevitably arise in national security/free speech cases. On the one hand, it is argued that the protection of national security is so fundamental to society, and the enemies to a nation's security (such as terrorists) employ such insidious methods to secure their aims, that government must be given wide latitude to promote national security; the courts should afford the government great deference in these circumstances. On the other hand, it is argued in opposition to the foregoing view that in times of severe threat to national security, freedom of expression and other basic rights are in such profound jeopardy that their protection requires increased vigilance.

Core issues that arise in this context include those of what exactly is meant by national security? Can it be defined? And who should have the final say on national security issues, the courts or the government?

2. BACKGROUND TO THE CANADIAN APPROACH

Freedom and Security under the Law, the Second Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (August, 1981); Summary of Recommendations.

4. WE RECOMMEND THAT the legislation establishing Canada's security intelligence agency contain a clause indicating that the agency's work should be limited to what is strictly necessary for the purpose of protecting the security of Canada and that the security intelligence agency should not investigate any person or group solely on the basis of that person's or group's participation in lawful advocacy, protest or dissent. ...
41. WE RECOMMEND THAT it not be the function of the security intelligence agency to carry out defusing programmes and that the agency not be permitted to use conspicuous surveillance groups for the purpose of intimidating political groups. ...
197. WE RECOMMEND THAT certain fundamental rights and freedoms, such as those specified in the Public Order (Temporary Provisions) Act, those specified in Article 4 of the International Covenant on Civil and Political Rights [including freedom of expression], and the rights of citizens not to be deprived of citizenship or exiled, not be abrogated or abridged by the War Measures Act or any other emergency legislation under any circumstances. ...

1. INTRODUCTION

Anglo-Canadian and U.S. statute and common law have traditionally placed great value on a person's good name and reputation. The tort of defamation originated as a common law cause of action, but now is governed by a mixture of common law and statutory provisions. It essentially gives a person a cause of action for damages if a statement is communicated to another about the plaintiff which is false, and which is injurious to his or her reputation. The civil law allows for some defenses. For example, certain statements, uttered in certain circumstances, are protected by either an absolute or qualified privilege. For example, truthful statements cannot give rise to a tort claim. Statements made in open court are absolutely privileged, no matter how defamatory. In addition to the civil action for defamation, the Criminal Code creates a seldom-invoked crime of criminal defamation.

Defamation law presents the vexing question of the state's role in drawing official lines between "truth" and "falsehoods". Defamation proceedings involve contests over whether a publication, broadcast or statement is truthful. This in turn raises the question of who is the appropriate arbiter of "truth" in a free and democratic society whose constitution enshrines freedom of expression as a supreme right? Is this the function of courts, of legislators, or ultimately, of the public alone?

Canadian criminal and civil defamation law evolved over many years, at a time when Canada's constitution included no supreme guarantee of freedom of expression or press. To what extent do the pre-existing civil law of defamation, and the Criminal Code defamation provisions withstand **Charter** scrutiny? While ruling on **Charter** claims in the earliest years of the **Charter**, some Canadian courts have suggested in passing (and at times, in wholly unrelated situations) that defamation law does not infringe upon the freedom of expression (see e.g. the Ontario Court of Appeal in Federal Republic of Germany v. Rauca (1983) 145 D.L.R. (3d) 638, at 655). However, did such courts jump too quickly to a conclusion which is either entirely or at least partially incorrect? The Supreme Court of Canada has not yet squarely considered whether defamation laws as such violate s. 2(b). However, the court unanimously held in its 1992 Zundel decision infra that s. 2(b) protects deliberate falsehoods, when it considered a challenge to a Criminal Code provision which prohibited the deliberate publication of false news injurious to the public interest.

Consider first how U.S. courts have dealt with First Amendment challenges in this area, and then look to the Canadian approach.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. ...

Such a privilege for criticism of official conduct [] is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. ... It is as much his duty to criticize as it is the official's duty to administer. As Madison said, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, ... the rule requiring proof of actual malice is applicable. ...

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. ...

For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." City of Chicago v. Tribune Co., 139 N.E. 86, 88 (1923)... . The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. ... Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied upon by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. ...

Notes and Questions

1. Justice Brennan's opinion relies quite heavily on Madison's views about the role which expressive freedom plays in a republican system of government. Do you agree that America's form of government was "altogether different" from the British form? Does Sullivan's theory of the first amendment apply with equal vigour in a parliamentary democracy? Why or why not?

2. Should all "false" speech be protected on the theory of Sullivan? Should false statements of fact be treated the same way as false statements of opinion? Holmes's example of a man falsely shouting "fire" in a crowded theater may seem obvious. Can you suggest other situations in which it would be appropriate to prohibit expressive activity simply because it is false? Is it feasible to draw bright jurisprudential lines between "fact" and "opinion" for these purposes?
3. As a practical matter, how can a plaintiff meet the Sullivan burden of proof in a libel action, beefed up by the First Amendment. What facts must be established to show that a media defendant knew that its publication was wrong, or was reckless as to its probable falsity? Where can a plaintiff discover evidence of these facts? How affordable will defamation actions be for plaintiffs?
4. What incentives are created by the Sullivan standard for journalists and media establishments? Is this standard a license to defame?
5. Would it be appropriate as an alternative standard to allow for a civil action to succeed if there is proof that the defendant was negligent, instead of reckless, in making the statement? Can courts enforce a legal standard akin to the "reasonable reporter"?
6. Sullivan involved a libel action against a newspaper, because of the contents of an advertisement which had been placed in that paper. Should the same free speech test be applied where the paper makes defamatory statements in its own news pages as when these statements are found in an advertisement, placed by sponsors extrinsic to the newspaper?

Hustler Magazine v. Falwell 108 S.Ct. 876 (1988).

Rehnquist, C.J.:

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for the respondent on the claim for intentional infliction of emotional distress and awarded damages. ...

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement of Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of

incite and immediate breach of the peace." [] These limitations are but recognition of the observation in Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that the public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the New York Times standard, see Time, Inc. v. Hill, U.S. 374, 390, (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment. ...

[F]or reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly reversed.

Notes and Questions

1. Is Rehnquist's opinion in this case consistent with his views about flag desecration? If it is permissible for the state to protect the symbolic status of the flag, why is it not permissible for the law of torts to protect the reputational and privacy interests of individuals? Is an act of flag desecration qualitatively more offensive, or more harmful to its unwilling audience, than commentary that pillories, maligns or belittles an individual would be to the target of an attack?
2. Is it appropriate to apply the Sullivan test to both tort actions for defamation and actions for intentional infliction of mental suffering? Are there arguments supporting a different standard to be applied to these different torts?
3. In Hustler, the court refers to its holding in Garrison v. Louisiana, supra, a case involving a criminal libel prosecution against a local district attorney for critical statements made against the local judiciary. In that state, both the district attorney and the judges were elected to office. Should the same First Amendment standard apply to both civil and criminal proceedings for defamation? Is there a constitutionally-relevant difference when a defendant faces proceedings instituted by the state, and when the proceedings are brought by a private party?

4. THE CANADIAN APPROACH

Notes and Questions

1. Does the tort of defamation, as traditionally constituted, comply with the **Charter**? Does it infringe s. 2(b)? Is defamatory or untrue speech simply unprotected by s. 2(b)? If not, to what extent is the tort of defamation saved by **Charter** s. 1? What arguments are there for and against the proposition that any defence to defamation law should be resolved under s. 1, and not under s. 2(b)?
2. Consider the application to this issue of R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 537 where the Supreme Court of Canada held that the Charter does not apply to private litigation between private parties, if the government is not a party, and no legislation is impugned. If followed, that case would appear to suggest that a purely common law tort of defamation would not be susceptible to **Charter** scrutiny. Does this make sense? Is there a valid ground for distinguishing Dolphin? Should a party, contesting the constitutionality of defamation law, simply argue that Dolphin is wrongly decided?
3. Richard J. decided to reject the American approach to the application of free speech to civil defamation law, as set out in New York Times v. Sullivan, on the basis that Canadian courts have "weighed more heavily the value of personal reputation over those of free speech and free press." How ought the adoption of the Charter affect this calculation? On what basis can a Canadian court form an informed opinion that Canadians give greater priority to individual reputation than do Americans? Would this comparison be borne out if one compared damage awards in Ontario libel actions to damage awards in similar cases tried in California courts?
4. Should the personal reputations of public figures receive the same protection as private individuals? Note that in New York Times v. Sullivan *supra*, the status of the plaintiff was that he was a public official. Subsequent cases have extended the doctrine to "public figures" who are involved in issues in which the public has a justified and important interest. See Curtis Publishing Co. v. Butts and Associated Press v. Walker, decided together at 388 U.S. 130 (1967). In Butts the Saturday Evening Post claimed that the University of Georgia athletic director (and former football coach) had fixed a football game. In Walker, AP reported that the plaintiff, a retired general, had led a violent crowd in opposition to the enforcement of a desegregation order at the University of Mississippi.
5. If the class of public figures is extended beyond public officials, is it possible to draw a meaningful line between those plaintiffs governed by the Sullivan rule, and those who are not? The media often view a "public figure" as being a person who has become newsworthy, in the sense that his or her conduct has become the focus of actual or perceived public interest. By this approach, a private citizen can suddenly become a "public figure" to the media, simply because their status or conduct has suddenly become the focus of public attention for a short time.

Should the "public figure" concept in the free speech/defamation context be extended this far? Would such an extension simply enable the media to insulate itself from defamation proceedings, by first making a person into a public figure through extensive news coverage, and then by invoking a Sullivan-type rule to defend its conduct?

5. The current Chief Justice of Canada gave a hint as to his views on these issues in Snyder v. The Montreal Gazette (1988), 49 D.L.R. (4th) 17 (S.C.C.), a case which considered the appropriate quantum of damages to be awarded a prominent public figure for non-pecuniary loss in a defamation action. As the defamation occurred in 1975, the Charter was not applicable directly, and the case turned largely on common law issues. However, Justice Lamer (as he then was) commented as follows in his dissenting judgement:

"Though it is a secondary consideration, there is one factor that must be taken into account in defamation cases. These often involve newspapers, press agencies and radio or television stations. In coming to the rescue of a defamation victim, the courts must not overlook the fact that the written and spoken press is indispensable and is an essential component of a free and democratic society. Moreover, both the Quebec and Canadian Charters recognize the importance of the press.... If information agencies are ordered to pay large amounts as the result of a defamation the danger is that their operations will be paralyzed or indeed, in some cases, that their very existence may be endangered. Although society undoubtedly places a great value on the reputation of its members, that value, as it is subjective, cannot be so high as to threaten the functioning or the very existence of the press agencies which are essential to preserve a right guaranteed by the **Charter**."

6. If it were to be adopted in Canada, how should New York Times v. Sullivan be applied in situations where an otherwise private individual is thrust into the limelight? The U.S. Supreme Court considered this issue in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) where the plaintiff was a lawyer who acted in a civil suit for the family of an individual shot by a Chicago City policeman. Gertz brought suit when a magazine published by the John Birch Society alleged that he had been part of a communist frameup which led to the policeman's conviction for murder. Gertz was a reputable lawyer, was not involved in the criminal proceedings, and had not discussed the matter with the press. The Court held that New York Times v. Sullivan did not apply, limiting the category of public figures as follows:

"For the most part [public figures are] those who attain this status [by assuming] roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classes as public figures thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

7. The foregoing discussion has assumed throughout that a plaintiff in a defamation action is

a human being, seeking the vindication of his or her reputation. Should the **Charter's** approach to defamation actions change if the plaintiff is a for-profit corporation? What interests are served by legal protection for the reputation of a business corporation? Are these interests as compelling as those protected by defamation law's umbrella over the good name of individuals? What test would be appropriate for determining the applicability of defamation law to a corporate plaintiff?

8. Assume that "Air Today, Gone Tomorrow Inc." is a non-profit charitable corporation, involved in the investigation of and publication of incidents of air pollution and other environmental hazards. After an investigation, it disseminated a pamphlet to the public which charges Ironmanco Ltd., a multi-national iron company, with wilfully dumping toxic waste into local waterways. For good measure, Ironmanco responds by circulating a pamphlet and publishing a newspaper advertisement which both claim that Air Today, Gone Tomorrow is nothing more than a front for Ironmanco's major iron-producing competitor. The environmental group sues both Ironmanco and the Daily Bugle newspaper for libel, alleging that the anti-environmental pamphlet and newspaper advertisement was scandalous and untrue. Ironmanco countersues the environmental group, alleging that its pamphlet was defamatory. What standard should apply to each of these defamation claims under the Charter?

9. Assume that the U.B.S. TV Network nightly news runs a lead story, during which the government of the City of Hillsborough is accused of deliberately enforcing municipal bylaws with intensified vigour against members of racial minorities, for the purpose of dissuading minority members from moving to that city. The City Council has acquired compelling, fully-admissible evidence to show that this news item was cooked, and was entirely falsified, to the manifest knowledge of the U.B.S. reporter and anchorperson. A civil defamation action is launched against U.B.S., the anchorperson and reporter, in which the Corporation of the City of Hillsborough is named as the sole plaintiff. Damages are claimed in the amount of \$10,000,000. Defence counsel argues that because the plaintiff is a government corporation, the media outlet has an absolute privilege to criticize its conduct, pursuant to the **Charter**. What arguments are there for and against this position?

10. In "The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place" 101 Harvard Law Review 1286, Judge Pierre Leval of the U.S. District Court argues that the First Amendment defamation standard should be altered from the Sullivan test of actual malice in cases where the plaintiff seeks no damages, but seeks instead only to secure a court declaration that the plaintiff has been libelled. Does this position have merit under the **Charter**?

11. In contrast to defamation actions which allege the publication of false statements, can the press be sued for an "invasion of "privacy", for publishing truthful statements? For example, can the media be held civilly liable for reporting true information about the plaintiff's personal life that are an embarrassing invasion of privacy and not newsworthy? See Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) whether a father sued a T.V. station for broadcasting the fact that his daughter had been a rape victim. The Court held that civil liability in a privacy action could not be imposed for truthfully publishing information released to the public in

official court records. To what extent do protection of reputation and protection of privacy command equal respect in our law? Are each of equal importance as a justification for limiting freedom of expression?

12. What scope has a provincial legislature to enact a statute, creating a cause of action for damages, where a statement is published about a person which holds him or her up to a "false light", e.g. by falsely stating that the plaintiff has achieved some important success or accomplishment which he or she has not in fact ever achieved? See Time Inc. v. Hill 385 U.S. 374, 87 S.Ct. 534 (1967), where the U.S. Supreme Court held as follows (per Brennan J.):

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press. [We] have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. ... We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or [portrait]. ...

We find applicable here the standard of knowing or reckless falsehood not through blind application of New York Times, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. [at 542-3].

The Charter and Criminal Proceedings Over Questions of Truth and Falsehood:

R. v. Zundel [1992] 2 S.C.R. 731

The accused was charged with spreading false news contrary to s. 181 of the Criminal Code, which provides that "[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment . . .". The charge arose out of the accused's

The second step of the test is to determine whether the purpose of the impugned legislation is to restrict freedom of expression. Here, the purpose of s. 181 is to restrict, not all lies, but only those that are wilfully published and that are likely to injure the public interest. Although the targeted expression is extremely limited, the provision does have as its purpose the restriction of free expression.

Accordingly, it must be found that s. 181 constitutes an infringement of the freedom of expression guaranteed under s. 2(b) of the Charter.

Before turning to s. 1 of the Charter, it is important to recall what has been written concerning the weight to be attached to other Charter provisions and the consideration of contextual factors. In Keegstra, supra, Dickson C.J., wrote at p. 734:

I believe, however, that s. 1 of the Charter is especially well suited to the task of balancing, and consider this Court's previous freedom of expression decisions to support this belief. It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in Irwin Toy indicates that the preferable course is to weigh the various contextual values and factors in s. 1.

(The s. 1 discussion is omitted.)

Notes and Questions

1. The Ontario Court of Appeal had held that false expression is not protected by s.2(b). Do you agree with McLachlin, J. that expressive activity that is not true can have social utility? What arguments for and against this proposition might be advanced in addition to those considered by the court?
2. Did Irwin Toy address itself to the question of s. 2(b) and false expression? Was it even in issue in that case?
3. Is there a difference from the s. 2(b) perspective between false speech on the one hand, and deliberately false speech on the other?
4. The dissenters claim to use a different approach for reaching the conclusion that s. 2(b) protects false expression in issue in this case than that used by the majority. What is the difference in their approaches?

5. Should the **Charter** only protect expressive activity that is considered "socially useful"? Whose perception of social value, truth or worth? Who should be the final judge of a statement's social utility, the courts, the legislature, or individual members of the public? Should govern? If a legislative majority is free to impose its own version of social orthodoxy, what is the point in protecting freedom of expression under the Constitution?
6. Is Salman Rushdie's portrayal of the Islamic faith "untrue"? Should it therefore be censored?
7. What about disbarred lawyer Kopyto's accusation that the "courts and RCMP are sticking so close together you'd think they were put together with Krazy Glue"? Is an accusation of that kind patently false, patently true, or a matter of perception? Is it a question of fact or a matter of opinion? Does it make any difference which it is? See R. v. Kopyto (1987), 62 O.R. (2d) 449 [Ontario Court of Appeal decision reversing a conviction for contempt of court.]
8. Suppose one is ludicrous enough to believe that the earth is flat, and seeks to persuade others of that view. What state interests would be served by punishing a person for that view?
9. Zundel was subject to a criminal prosecution. Would the **Charter's** impact be different if his conduct had been the subject of a civil action for damages by Holocaust survivors? What if the civil proceeding was brought exclusively for a declaration?
10. Zundel was convicted under a Criminal Code provision which required the Crown to establish before a jury beyond a reasonable doubt that Zundel's statements were in fact false, and that Zundel knew his statements to be false. Would this criminal burden satisfy the Sullivan test? Is it sufficient to ensure that constitutionally protected expression will not be chilled? How can this "chilling effect" be documented by a court, short of mere judicial speculation?
11. Would the answers to the preceding questions be different if the Crown could obtain a conviction by proving beyond a reasonable doubt that Zundel was simply reckless as to the probable falsity of his statements?
12. Compare this discussion of prosecution for "false news" dissemination with the discussion later in these materials of the relationship between hate propaganda laws and **Charter** s. 2(b). Are there material differences, from the **Charter's** perspective, between prosecutions for breach of the "false news" law, and prosecutions for contravention of the Criminal Code's hate propaganda provisions.
13. At Zundel's trial, the Crown unsuccessfully sought to have the court take judicial notice of the existence of the Holocaust, in order to dispense with the need to actually prove that it happened through sworn testimony. Ordinarily, a court can take judicial notice of facts which are either universally known, or capable of ready proof through resort to sources of uncontested authority. What impact if any should the **Charter's** free expression guarantee have on the availability of judicial notice in such cases?

1. INTRODUCTION

This Chapter examines the status of commercial expression under the **Charter**. Our law is replete with extensive and intensive regulation of economic activities, aimed at protecting the public and ensuring orderly and fair practices in the economic marketplace. The idea of *laissez faire* in the sphere of economic and business activities in Canada is, at best, nothing but a fiction, in light of the thousands of pages of statutes and regulations which govern commercial activity. Moreover, the Supreme court of Canada held in Edwards Books and Art Ltd. v. the Queen, [1986] 2 S.C.R. 713 that business regulations do not impinge upon the **Charter's** values.

In this web of commercial regulation one finds a myriad of provisions regulating the form and content of advertising and other communications and activities related to the promotion, marketing, distribution and labelling of goods and services. The question presented in this chapter is whether and to what extent the **Charter** effects the validity of these provisions. Are they to be treated as a mere adjunct of the maze of commercial regulations, or as an unwarranted intrusion into freedom of expression.

This topic compels a vigorous consideration of the purposes for guaranteeing freedom of expression, and the extent to which an unpopular political dissident's speech, which condemns the government of the day, can be constitutionally equated with a television advertisement which explicitly or implicitly suggests that the sponsor's brand of beer will help virile men entice attractive women. It is fair to expect that commercial speech claims will be advanced with business profits at heart, and so the subject also leads to a consideration of how the charter impacts on economic regulation, and economic rights. In this area, the issues which merit consideration include among them the following:

- (1) whether **Charter** s. 2(b) confers constitutional rights on corporations;
- (2) whether commercial expression is protected by **Charter** s. 2(b), and if so, to what extent?
- (3) what is meant by "commercial speech"?
- (4) If commercial speech is protected by **Charter** s. 2(b), then what test is to be applied under **Charter** s. 1 to assess limits on commercial expression?
- (5) What specific restrictions on commercial speech comply with s. 1?

Although the Supreme Court of Canada concluded that commercial expression is covered by S.2(b) in Ford v. A-G of Quebec, and reinforced that conclusion in Irwin Toy, it is worthwhile nonetheless to question that decision and examine the Court's reasons for extending the **Charter's**

protection to pure commercial expression. Accordingly, the materials begin with the s. 2(b) rulings in Ford and Irwin Toy.

The issue which will attract the most attention at present, however, concerns the permissibility of limitations under section 1. The materials under this heading have been divided into four subsections: the first deals with a uniquely Canadian question - the extent to which the language of commercial expression in the form of commercial signs can be regulated in order to preserve and promote Quebec's linguistic distinctiveness. The second considers regulation of advertising targeted at children. The third addresses regulation of professional advertising and the fourth with restrictions on the solicitation of harmful or immoral conduct. In terms of professional advertising, the Supreme Court of Canada's recent decision in Rocket v. Royal College of Dental Surgeons raises a number of interesting questions. After considering some of those issues, the materials include a recent U.S. Supreme Court decision dealing with questionable advertising practices in the legal profession.

Equally interesting are restrictions on advertisements or the solicitation of activities that are considered harmful or immoral. The Supreme Court of Canada's recent decision upholding Criminal Code provisions prohibiting the solicitation of prostitution requires close examination. That decision is topical, because of its controversial application of s. 1 to the case's facts. The Posadas decision from the U.S. Supreme Court has been included because it deals with the question whether the advertising of an activity can be regulated when the activity itself is legal.

Cases dealing with the status of commercial expression raise an issue that was touched upon in previous chapters; i.e., whether all expressive activity should receive the same protection or whether, on the other hand, it is more appropriate to acknowledge a hierarchy of expressive freedom values. At present in Canada, the Oakes test is said to govern in all cases in which an initial breach of the **Charter** has been found. Is it realistic for the Supreme Court of Canada to cling to the concept of a universal and monolithic standard of justification? That question is particularly relevant in the context of commercial expression.

2. COMMERCIAL EXPRESSION AND SECTION 2(b)

Ford v. Quebec (A.-G.), [1988], 2 S.C.R. 712.

(The Supreme Court considered a free expression challenge to Quebec's sign law, which at the time required that commercial signs and firm names be exclusively in French.)

VIII. Whether the Guarantee of Freedom of Expression Extends to Commercial Expression

... [T]here cannot be a guaranteed freedom to express oneself in the language of...choice in respect of a form or kind of expression that is not covered by [s.2(b)]. The question whether [s.2(b)] extends to [commercial expression] ...is therefore an issue. ...

Notes and Questions

1. What reasons did the Supreme Court of Canada give for protecting commercial expression in Irwin Toy and Ford? Did those reasons persuade you that the majority decision in Klein and Dvorak was incorrect?
2. What about levels of scrutiny? Should the Supreme Court of Canada treat all categories of speech as equal, and apply the Oakes test in all cases of interference with expressive freedom? Alternatively, should the Court recognize a hierarchy of values? Would it be preferable for the Court to apply issue-specific standards of justification under s.1, like the U.S. Supreme Court does?
3. In Ford, the Supreme Court of Canada claims that the Oakes test and Central Hudson are very similar. Do you agree with that statement? Do you see any relevant differences between the Canadian and American tests?
4. How does one define "commercial expression"? Presumably it would include speech which proposes a commercial transaction. However, does it go further, and if so, how far? Does a message constitute "commercial expression" where a supermarket chain includes in an advertisement a list of suggestions of how to recycle packaging on products purchased from their stores? Would it include a T.V. ad which both promotes the purchase of eggs, and advocates that eggs are a healthy food to eat, despite the contrary claims of government public health officials?
5. Does **Charter** s.2(b) entitle producers of margarine to produce and sell yellow-coloured margarine, in a tint which resembles butter? In Institute for Edible Oil Foods et al. v. A.G. Ontario et al., (1987), 63 O.R. (2d) 436 (Ont. H.C.), an association of margarine producers challenged the constitutionality of the requirement in s.4 of the **Oleomargarine Act** that margarine be coloured either deep orange or white, unlike butter. Evidence suggested that this requirement leads consumers to often purchase butter rather than margarine, and that a repeal of this colour requirement would cause a shift in purchasing and consumption patterns leading millions of dollars to switch from the dairy industry to the margarine industry. Crown evidence suggested that Ontario's dairy industry is central to the province's agricultural industry. This industry is in a very precarious economic state, and requires extensive government support to survive. The Supreme Court of Ontario found that this colour restriction infringes **Charter** s.2(b) because "the manner in which a product is presented to the public - its size, shape, colour, texture, and any other distinguishing feature incorporated into the product itself - constitutes a form of advertising which, although different in type from advertising by words and pictures, is none the less a form of expression." It then held that this is a reasonable limit under s.1, needed to protect the Ontario dairy industry.

On appeal (1989), 71 O.R. (2d) 158 (Ont. C.A.) the Court doubted whether colouring constituted expression and affirmed that if so the legislation was justified pursuant to s.1. The Court of Appeal ruled as follows:

2. There is no doubt that "commercial" speech or communication of a commercial message is included within the freedom of expression in s. 2(b) of the Charter and that it is a freedom applicable to the one who receives as well as the one who transmits the message: Ford v. Quebec [supra]; Irwin Toy Ltd v. Quebec [supra].

3. Even if s. 4 of the Act has the purpose and effect of interfering with margarine manufacturers or sellers with respect to their communicating a desired commercial message, that message is one related to the use of a colour which is traditionally associated with the taste and nutrition of butter. Even if we accept that consumption of margarine does not have some of the detrimental health effects that recent research has shown to be associated with the consumption of butter, it is difficult to see how the restriction inhibits the health objective of convincing consumers that margarine has less potential to cause cardio-vascular disease than butter. In any case, it is difficult to see how the freedom of expression asked for in this case furthers the purposes for the guarantee of the freedom as suggested by the Supreme Court of Canada in Irwin Toy, supra, at p. 606, or Ford, supra, at pp. 618-9, i.e. search for truth, contribution to formulation of beliefs or to the effective operation of democratic institutions or the fulfillment of individual autonomy or of self-validation. We have serious doubt as to whether there is here a contravention of s. 2(b) of the Charter.

4. Even if the restriction here is a contravention of s. 2(b) of the Charter, it is a reasonable limit under s. 1 of the Charter. After articulating the very detailed tests set out in R. v. Oakes..., the Supreme Court of Canada has subsequently suggested that courts should not subject governmental choices to judicial preferences and thus to second-guess the choices of elected officials between competing economic claims of different economic groups in the private sector: Edwards Books and Art Ltd. v. The Queen (1986), 35 D.L.R. (4th) 1 at pp 44, 51-2...; Irwin Toy, supra, at pp. 625-6. However, even if we were to apply the Oakes test in detail, we would have to conclude that, considering the economic importance of the dairy industry, both with respect to size and with respect to the largely foreign-owned condition of the latter, we cannot conclude that the need for the restriction on the latter is other than substantial and pressing. Next, there is no doubt that the restriction is rationally related to the protection of the dairy industry. In applying the "least restrictive" test, we must note what was said earlier about courts not second-guessing legislatures, as well as the fact that there is no restriction on the promotion of the use of margarine in any other way. In fact, it may be that the health benefits of using margarine may be better promoted in distinguishing it from butter. This relates also to the proportionality test, because the restriction here does not preclude other means of promoting the consumption of margarine. That promotion is restricted as minimally as possible. Therefore, we conclude that even if there has been an infringement of s. 2(b) of the Charter, the legislative provision impugned here is a reasonable limit within the meaning of s. 1 of the Charter.

The Supreme Court of Canada denied leave to appeal from this decision.

6. Assuming that commercial expression is protected under **Charter** s. 2(b) pursuant to Ford and Irwin Toy, does **Charter** s. 2(b) also extend constitutional protection to false, misleading or deceptive advertising? Consider three fact situations:

(a) Wesley Crusher Enterprises markets a toy rocketship which it advertises as being "proven safe for use by children of all ages". The claim is based on a study, done for WCE, which in fact demonstrated that young children face a serious risk of wounding themselves on sharp edges of the toy. WCE saw these test results, but chose to run the advertisement anyway. The T.V. network, running the ad, never checked its accuracy?

(b) Assume in the foregoing situation that the testing was done by an independent consultant, which falsified the test results to wrongly show that the toy was safe, and then gave this false report to WCE. WCE relied on the report's apparent endorsement of the toy in drafting its advertisement. So did the T.V. network which ran the advertisement.

(c) Assume instead that the independent consultant did the testing, and in fact proved the toy to be safe. The ad ran with the approval of WCE and the T.V. network relying on the results. It turns out later that the toy was defective and dangerous, and that an insufficient testing had been done by the consultant. A more effective testing method documents the toy's dangerousness, but this method was unknown to WCE, the consultant, and the T.V. network at the time.

Would civil or criminal proceedings for false advertising in any of these cases infringe the s. 2(b) rights of WCE or the T.V. network?

7. Was it necessary in Ford for the Supreme Court to address the broad question of the treatment of commercial speech under the **Charter**. Ford dealt with quebec's controversial language restrictions on public signs. Is the question of language distinct from commercial speech questions? Could s. 2(b) be construed to protect one's choice of language, even if **Charter** s. 2(b) does not protect commercial speech as such?

8. Ford and Irwin Toy essentially assume that s. 2(b) guarantees constitutional rights to corporations, and not merely to human beings. Ought this be so? Ought this be decided without some reasons? Does **Charter** s. 2(b) give the same rights to corporations as it does to human beings? do trade unions also have s. 2(b) rights, apart from those of their members? See further the consideration of this issue in the chapter on regulation of the electoral process.

is whether any such prohibition is justified. In the opinion of this Court it has not been demonstrated that the prohibition of the use of any language other than French in ss. 58 and 69 of the Charter of the French Language is necessary to the defence and enhancement of the status of the French language in Quebec or that it is proportionate to that legislative purpose. Since the evidence put to us by the government showed that the predominance of the French language was not reflected in the "visage linguistique" of Quebec, the governmental response could well have been tailored to meet that specific problem and to impair freedom of expression minimally. Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under the Quebec Charter and the Canadian Charter, requiring the exclusive use of French has not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the "visage linguistique" reflected the demography of Quebec: the predominant language is French. This reality should be communicated to all citizens and non-citizens alike, irrespective of their mother tongue. But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society. Accordingly, we are of the view that the limit imposed on freedom of expression by s. 58 of the Charter of the French Language respecting the exclusive use of French on public signs and posters and in commercial advertising is not justified under s. 9.1 of the Quebec Charter. In like measure, the limit imposed on freedom of expression by s. 69 of the Charter of the French Language respecting the exclusive use of the French version of a firm name is not justified under either s. 9.1 of the Quebec Charter or s. 1 of the Canadian Charter. ...

Notes and Questions

1. Is there something unique about the language issue in Canada to make the standard employed by the court in *Ford* under s. 1 distinctive, or is it equally applicable in other kinds of commercial advertising cases?
2. The court suggests that it might uphold a law which gives French predominance on signs, as long as it is not exclusive. What is the difference between that option and the impugned law, from the perspective of s. 2(b) values? From the perspective of the promotion of the impugned law's social objectives?
3. Is this the kind of case where the court should be deferential to the legislature, as it was later to urge in *Irwin Toy* for cases where the law-makers seek to balance the competing interests of different social groups? Was the court deferential to the legislature here?
4. Why did the court take into account the purposes for freedom of expression when it determined that the impugned law's aims were sufficiently important to outweigh the guarantee of s. 2(b)?

individuals or groups, the measure will not be justified by the purposes it is intended to serve" (Oakes, at p. 140). The final component of the proportionality test is easily satisfied. ...

c. Conclusion

Based on the s. 1 and s. 9.1 materials, we conclude that ss. 248 and 249 constitute a reasonable limit upon freedom of expression and would accordingly uphold the legislation under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.

Notes and Questions

1. On Irwin Toy's reasoning, would the law be upheld if it banned advertising targeted at children under the age of 16? 18?
2. The court states in Irwin Toy that it will be more deferential to government under s. 1, where the government is arbitrating between the interests of different groups in society. why should this be so? Does the government not always engage in such balancing? Does every **Charter** question arising in the criminal justice context balance the rights of accused persons, victims and the law-abiding public?
3. Assume that the nine other provinces placed no restrictions on advertising targeted at children. Should the court take this into account under s. 1? Why or why not?
4. What if a 12 year old child brought a challenge to the same legislation, arguing that it infringed his or her freedom of expression, including the right to receive information. Does Irwin Toy answer this claim?
5. Should the same s. 1 test apply to restrictions on commercial speech by corporations and commercial speech by individuals?
6. Assume that a law provides as follows:
 - (1) Every television network shall ensure that in its advertising, there shall be a fair representation of men, and women, persons who have white skin and persons who do not, and persons with disabilities and persons who do not have disabilities.
 - (2) The purpose of this provision is to help eradicate stereotypes respecting disadvantaged persons and groups in society, and in particular, those disadvantaged because of their sex, race or disability.

(3) The Governor General in council may make regulations prescribing the meaning of the terms used in this provision.

Would this provision comply with the **Charter**? If not, what changes could be made to it, if any, to bring it into conformity with the **Charter**?

c) Regulation of Professional Advertising:

Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232.

[Dr. Howard Rocket and Dr. Brian Price are dentists [who] were prominently featured in an advertisement for Holiday Inn hotels published in a number of Canadian magazines and newspapers under the heading "New Faces of the Canadian Establishment". As a result of their participation in this advertising campaign, Dr. Rocket and Dr. Price were charged with violating subss. 37(39) and (40) of Regulation 447 of the Health Disciplines Act. They challenged the constitutionality of s. 37(39).]

McLachlin J.:-- ...

General Considerations

This case poses a conflict between two values recognized in our society - the need to regulate the scope of professional advertising on the one hand and the value of free expression on the other. ...

Although it has been clearly held that commercial expression does not fall outside of the ambit of s. 2(b), [See Ford and Irwin Toy] the fact that expression is commercial is not necessarily without constitutional significance. Regulation of advertising may offend the guarantee of free expression...but this does not end the inquiry. The further question of whether the infringement can be justified...must be considered. It is at this stage that the competing values - the value of the limitation and the value of free expression - are weighed in the context of the case. Part of the context [here] is the fact that the expression at issue is wholly within the commercial sphere.

II. Does the Regulation Offend the Guarantee of Freedom of Expression under s. 2(b) of the Charter?

... The first question is whether professional advertising constitutes expressive activity under s. 2(b) of the Charter. The test is whether it aims to convey a meaning: Irwin Toy. Clearly professional advertising meets this test.

The second question is whether the expressive activity limited by the Regulation is

Notes and Questions

1. On its face, is there anything problematic about the Rocket/Price promotional? Can you think of any interest that would be served by prohibiting a promotion of this kind?
2. Is there any ambiguity in Justice McLachlin's approach to section 1? Specifically, she claims that not all expression is equally worthy of protection, and that not all infringements of free expression are equally serious. At the same time, however, she is unwilling to admit that it is necessary to adopt different standards of justification for different issues under section 1. Can she have it both ways? Why or why not?
3. Justice McLachlin also clearly indicates that expression designed only to increase profit is not as important as other kinds of expressive activity. Is there any difference between advertisements that promote one's professional stature, and advertisements that promote a particular political position, candidate or party? In other words, is self-interest and self-promotion only found in the economic sphere and not at all in the political sphere? Why then should commercial expression receive less protection than political expression?
4. What reasons do professional regulatory bodies give for placing restrictions on advertisements? Is the profession's interest in "public respect" a sufficient reason for limiting advertising activities? In passing advertising restrictions, to what extent do self-governing professional bodies appear to be attempting to protect the public, and to what extent do they appear to be trying to protect themselves? Assume that there was an entire ban on advertising by lawyers. Who would suffer from this requirement?
5. Precisely what is "professionalism": the right of any profession to protect its stature?
6. Does the delegation of authority to professional associations to regulate their members work effectively in protecting the public from misleading and unscrupulous practices? In other words, is there any reason to believe that the public is at greater risk of negligent or inadequate service as a result of advertising than in the past, under a ban on advertising? Is competition between dentists or lawyers or physicians inherently unprofessional, or inherently detrimental to the public?
7. Justice McLachlin agrees that advertising by professionals can be regulated because there is no way for the average consumer to evaluate claims of competence or expertise. How often do consumers evaluate the competence of professionals like dentists, doctors and lawyers, before invoking their services? Is the public more vulnerable or less vulnerable as the result of advertising?
8. In what circumstances should legislation that is invalid in the particular circumstances before the Court be read down, and in what circumstances should it be completely invalidated? For further discussion, see Peel v. Disciplinary Commission of Illinois.
9. Section 67(2) of the Health Disciplines Act provides that a health care provider can use the

title "doctor" in the context of delivering health care to members of the public only if he or she is a physician, dentist, or optometrist. A podiatrist is a health care professional, trained in a U.S. school, who provides specialized foot care. Podiatrists are not physicians, but receive a degree called a "doctor of podiatric medicine". Does **Charter** s.2(b) entitle a podiatrist to call himself or herself "Dr. Peach" or to have their receptionist answer their phone "Doctor's Office"? If so, would s. 67(2) of the Health Disciplines Act be saved under **Charter** s.1? For example, in College of Physicians and Surgeons v. Larsen (1987), 62 O.R. (2d) 545 (Ont. H.C.), R.E. Holland J. stated:

In my opinion, the prohibition complained of does not infringe Gary Larsen's right to express that qualification. It merely restricts the manner in which the qualification may be expressed. The subsection does not prevent him from communicating the nature and fact of his degree by the suffix D.P.M. or Doctor of Podiatric Medicine. Nor does it prevent him from using the prefix "Doctor" or "Dr." in matters unrelated to his practice of podiatric medicine. It merely restricts the use of these terms: "as an occupational designation relating to the treatment of human ailments or physical defects".

Even had I come to the opposite conclusion, I would have found that the prohibition contained in the subsection can properly be supported by s. 1 of the Charter...

On the evidence, there is a considerable degree of confusion in the minds of the public as to whether a podiatrist is a medical doctor. Logically, this confusion is contributed to by podiatrists' use of the prefix "Dr." in the context of the treatment of human ailments. The existence of this confusion gives rise to a serious potential for harm by depriving individuals, especially the elderly, of an informed choice as to whether they wish to be treated by a podiatrist, a physician or an orthopedic surgeon. ...

The prohibition on the use of the title "Doctor" or "Dr." as an occupational designation deals directly with the problem of confusion which has been identified. Further, it leaves Gary Larsen free to express his degree as D.P.M. or Doctor of Podiatric Medicine as an occupational designation and to use the titles "Doctor" or "Dr." apart from his practice of podiatry. The prohibition, therefore, goes no further than is reasonably necessary to remove the confusion and the ensuing potential for harm. [at 552-4].

10. A chiropractor gives an interview to a newspaper reporter, in which he claims that through manipulation of the spine, he can cause the regeneration of spinal discs. The self-governing regulatory body for chiropractors, the Board of Directors of Chiropractic, brings disciplinary proceedings against him for breaching s.12(3) of the regulations under the **Drugless Practitioners Act** which prohibits "falsehood, misrepresentations, misleading or distorted statements as to bodily functions...or as to cures by any method of treatment used by him". Can he successfully invoke s. 2(b) in his defence? What evidence and arguments should the parties tender?

11. Originally, the U.S. Supreme Court treated commercial speech as outside the reach of the First Amendment. This was reversed in the landmark case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council 96 S.Ct. 1817 (1976), in which the U.S. Supreme Court

invalidated a statute that made advertising of prescription drug prices "unprofessional conduct" and subjected pharmacists to the possibility of licence suspensions or revocations. Blackmun J., for the Court, commented as follows:

Here,...the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment. ...

[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is sold for profit. [Our] question is whether speech which does "no more than propose a commercial transaction," is so removed from any "exposition of ideas," and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government" that it lacks all protections. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him for protection under the First Amendment. ...

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial", may be of general public interest. ...

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few.

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved

criteria are. Even if the State were to permit claims of certification along with disclaimers...the State would have to engage in case-by-case review to ensure that the misleading character of a particular claim to certification was cured by a particular disclaimer. Alternatively, the State would be forced to fashion its own disclaimer for each organization for which certification is claimed by the attorneys within its borders, provide for certification itself, or, at the least, screen each organization. ... Although having information about certification may be helpful for consumers, the Constitution does not require States to go to these extremes to protect their citizens from deception. In my view, the Court would do well to permit the States broad latitude to experiment in this area so as to allow such forms of disclosure as best serve the State's legitimate goal of assisting its citizens in obtaining the most reliable information about legal services. ...

For the foregoing reasons, I would...and affirm the decision of the court below.

Notes and Questions

1. To the extent that the decision in Rocket could be easily decided on the basis that the legislation in question constituted a gross interference with any right to engage in professional advertising, Peel indicates that the constitutional questions at stake may not always be so easily resolved. In particular, this decision provides an interesting dialogue about choice of remedy.

Given agreement by a majority of the Court that the petitioner's letterhead was potentially misleading, what do you think the appropriate remedy should have been: invalidation of a rule that could be unconstitutional in some applications because it prohibited a lawyer from representing himself or herself as a specialist in all circumstances; or application of a rule with potentially overbroad consequences to this case because the particular advertisement by the lawyer subject to disciplinary proceedings in Peel was potentially misleading? In your view, what considerations should determine who receives the benefit of the doubt as between a lawyer in petitioner's situation and State Bar Disciplinary Commission?

2. In Rocket, Justice McLachlin acknowledges that overbreadth does not have application in the cases under the First Amendment that raise issues of commercial expression. Overbreadth is a special doctrine that permits an applicant to raise the First Amendment claims of third parties not before the Court in defence in an action where that person would otherwise have no First Amendment claim. If the petitioner's letterhead was potentially misleading and he therefore was not entitled to the protection of the First Amendment, why should he be entitled to prevail in this case? Why should successful disciplinary proceedings depend on a showing that his advertisement did in fact mislead certain consumers? Is it relevant in determining the constitutionality of hate propaganda provisions, that the perpetrator's opinions did not mislead anyone? Is this a relevant consideration in any case? Should it be considered relevant in commercial expression cases?

3. Once again, the relevant constitutional question is whether the consumer is entitled to have free access to professional advertisements, or whether, on the other hand a regulatory body is

entitled to screen the professional solicitations of its members. Without such advertisements, how do consumers get any information about professionals? Are they better served by having no information, or by having some information, some of which may involve enhanced or exaggerated claims as to competence?

4. Should the requirement under s. 1 of the Charter that a law not be excessively vague or uncertain be applied any differently in commercial expression cases? Is it constitutionally acceptable to have a greater margin of imprecision in commercial speech regulations than in political speech restrictions?

4. RESTRICTIONS ON SOLICITATION OF HARMFUL OR IMMORAL CONDUCT

Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123.

[Section 195.1 of the Criminal Code provides:

Offence in Relation to Prostitution

- 195.1(1) Every person who in a public place or in any place open to public view
- (a) stops or attempts to stop any motor vehicle,
 - (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
 - (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.
- (2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.]

Dickson C.J.:-- ...

[The Court's discussion of s.2(b) is omitted. Only Lamer J. engaged in an extensive analysis of that issue.]

secluded area of a park where there is no-one to see or hear it. It will still be a criminal offence under the section. Such a broad prohibition as to the locale of the communication would seem to go far beyond a genuine concern over the nuisance caused by street solicitation in Canada's major centres of population. It enables the police to arrest citizens who are disturbing no-one solely because they are engaged in communicative acts concerning something not prohibited by the Code. It is not reasonable, in my view, to prohibit all expressive activity conveying a certain meaning that takes place in public simply because in some circumstances and in some areas that activity may give rise to a public or social nuisance.

I note also the broad scope of the phrase "in any manner communicates or attempts to communicate". It would seem to encompass every conceivable method of human expression. Indeed, it may not be necessary for the prostitute to say anything at all in order to be found to be "communicating" or "attempting to communicate" for the purpose of prostitution. The proverbial nod or wink may be enough. ... Some definitional limits would appear to be desirable in any activity labelled as criminal.

Directly relevant to the issue of proportionality, it seems to me, is the fact already referred to that under para. (c) no nuisance or adverse impact of any kind on other people need be shown, or even be shown to be a possibility, in order that the offence be complete. Yet communicating or attempting to communicate with someone in a public place with respect to the sale of sexual services does not automatically create a nuisance any more than communicating or attempting to communicate with someone on the sidewalk to promote a candidate for municipal election. Moreover, as already mentioned, prostitution is itself a perfectly legal activity and the avowed objective of the legislature was not to make it illegal but only, as the Minister of Justice emphasized at the time, to deal with the nuisance created by street solicitation. It seems to me that to render criminal the communicative acts of persons engaged in a lawful activity which is not shown to be harming anybody cannot be justified by the legislative objective advanced in its support. The impugned provision is not sufficiently tailored to that objective and constitutes a more serious impairment of the individual's freedom than the avowed legislative objective would warrant. Section 195.1(1) (c) therefore fails to meet the proportionality test in Oakes. ...

Notes and Questions

1. Given the Court's repeated assertions, both in this case and in Rocket, that the Court should take the context into account under section 1 - and in particular the economic context of these cases - can one justify its continued reliance on the Oakes test in these cases?

2. Is the fact that it might be a nuisance a sufficient justification for the infringement of expressive freedom? Can you think of other situations in which the exercise of a section 2(b) right might be a nuisance, but is tolerated nonetheless? Why are the Courts less willing to tolerate the nuisance inherent in street prostitution than the nuisance inherent in a variety of street activities like hawking, peddling, petty sales and pamphleteering? Is the public's moral disapproval of a

solicitation activities part of the subtext here? If it is, do you think that is an appropriate consideration? Is the inconvenience of those who must pass by prostitutes or even be confronted by them a relevant consideration?

3. Under the s. 1 test, in deciding whether a **Charter** infringement complied with s. 1, the court must consider if the societal purpose for limiting the constitutional right is "sufficiently important" to warrant the overriding of that **Charter** right, what should the court take into account in deciding whether the government's purpose is "sufficiently important", or "pressing and substantial"? Is it merely a question of whether the law's goal is appealing to the court, or is it something more? What did the supreme Court in fact take into account in this case?

4. As far as the Supreme Court of Canada is concerned, is the prohibition on the solicitation of prostitution only justifiable for acts of solicitation that occur in the streets? Does the prohibition itself speak exclusively in terms of streets, as opposed to other public places? Once the Court has declared the legislation valid, does it matter that it considered the eradication of street prostitution its primary rationale, so long as any subsequent act of solicitation occurs in public? In more abstract terms, once legislation is upheld under the **Charter**, is it possible to argue that it can have unconstitutional applications in situations where the words of the statute unquestionably apply to the facts?

5. Justice Wilson's dissenting opinion emphasizes that, although the act of prostitution is itself not illegal, its solicitation on streets is nonetheless. Given that expressive activity is specifically protected by the **Charter**, and that mere conduct is not, how is it possible for parliament to regulate the solicitation of an activity such as prostitution which is not illegal? This is a question of fundamental conceptual and doctrinal importance.

**RJR - MacDonald Inc. v. Canada (Attorney General), Supreme Court of Canada
unreported, released Sept. 21 1995**

The Tobacco Products Control Act (the Act) broadly prohibited (with specified exceptions) all advertising and promotion of tobacco products and the sale of a tobacco product unless its package includes prescribed unattributed health warnings and a list of toxic constituents. The legislative scheme targeted three distinct categories of commercial activity: advertising, promotion and labelling. The Act, except for a prohibition on the distribution of free samples of tobacco products, did not proscribe the sale, distribution or use of tobacco products.

These proceedings began with two separate motions for declaratory judgments before the Quebec Superior Court. The appellant RJR - MacDonald Inc. ("RJR") sought a declaration that the Act was wholly ultra vires Parliament and invalid as an unjustified infringement of freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. The appellant Imperial Tobacco Ltd. ("Imperial") sought the same order, but only in respect of ss. 4 and 5 (advertisement of tobacco products), and ss. 6 and 8 (promotion of tobacco products). The two

Notes and Questions

1. This decision concerns the application of the Central Hudson test, which was cited by the Supreme Court of Canada in Ford, *supra*. As Posadas illustrates, whether this standard is strict or deferential depends entirely on how it is applied. Does uncertainty about the way in which it will be applied defeat the purpose of a special standard of justification? In other words, if Central Hudson has just as many strict and deferential applications as the Oakes test, does that suggest that a single or monolithic standard of justification can suffice? On the other hand, would it be preferable for the Supreme Court of Canada to articulate a series of issue-specific standards of justification? Why or why not?
2. In his majority opinion, Justice Rehnquist claims that it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing demand through restrictions on advertising. As Justice Stevens succinctly restates the point, "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling". Do you agree? In addition, Justice Rehnquist appears willing to assume that the restrictions on advertising will in fact reduce the demand for gambling by Puerto Rican residents. Under the Central Hudson test, does the state have the burden to establish the efficacy of its restriction on advertising in order to satisfy the requirement that the restrictions are no more extensive than necessary?
3. Note that a bill "To ban the promotion of tobacco products" was introduced in the One Hundred and First congress. Reciting the dangers of smoking, the bill notes that the tobacco industry spends two billion dollars annually "to attract new users, retain current users, increase current consumption, and generate favourable long-term attitudes towards smoking and tobacco use", and that "tobacco product advertising deceptively portrays the use of tobacco as socially acceptable and healthful". The bill would prohibit all "consumer sales promotion", which includes "all radio and television commercials, newspaper and magazine advertisements, billboards, posters, signs, decals, matchbook advertising, point-of-purchase display material and all other written or other material used for promoting the sale or consumption of tobacco products to consumers". Under Posadas, would this legislation be upheld, if enacted? Would an indirect approach, such as disallowing deductions for advertising expenses pursuant to the Internal Revenue Code, be more acceptable constitutionally?
4. Would it be constitutional for the province to outlaw "lifestyle" advertisements for alcoholic drinks? Draft a provision which would meet s.1's requirements of clarity, precision, and minimal impairment.
5. Would it be constitutional for the province to pass a law requiring the producers of all alcoholic drinks to include the following on the label of each bottle:

- (1) The consumption of alcohol is dangerous to your health.
- (2) Alcohol is an addictive drug.
- (3) Don't drink and drive!

